

**OFFICIAL CODE  
OF  
GEORGIA**  

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**ANNOTATED**



**VOLUME 7A**

Title 9. Civil Practice  
(Chapters 12 to 16)

2015 Edition





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# OFFICIAL CODE OF GEORGIA ANNOTATED

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With Provision for Subsequent Pocket Parts

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*Prepared by*

The Code Revision Commission  
The Office of Legislative Counsel

*and*

The Editorial Staff of LexisNexis®



Published Under Authority of the State of Georgia

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## **Volume 7A** **2015 Edition**

Title 9. Civil Practice  
(Chapters 12 through 16)

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Including Acts of the 2015 Session of the General Assembly of Georgia  
and Annotations taken from the Georgia Reports  
and the Georgia Appeals Reports

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2015



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**OFFICE OF SECRETARY OF STATE**

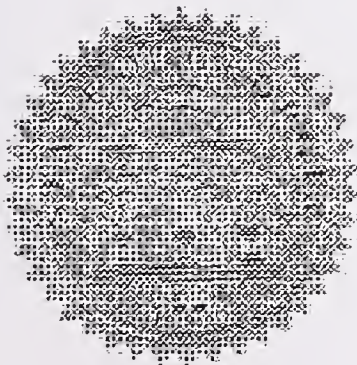
**I, Brian P. Kemp, Secretary of State of the  
State of Georgia, do hereby certify that**

the statutory portion of the Official Code of Georgia Annotated contained  
in this volume is a true and correct copy of such material as enacted by  
the General Assembly of Georgia; all as same appear of file and record in  
this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed  
the seal of my office, at the Capitol, in the City of Atlanta, this  
10th day of July, in the year of our Lord Two Thousand and  
Fifteen and of the Independence of the United States of  
America the Two Hundred and Fortieth.

*B. P. Kemp*

Brian P. Kemp, Secretary of State









## Preface

This volume, along with the 2015 edition of Volume 7, cumulates and replaces the 2014 edition of Volume 7 of the Official Code of Georgia Annotated. The 2014 Volume 7 may thus be discarded or, if so desired, may be retained for historical purposes only.

This volume contains all laws specifically codified in Title 9, Chapters 12 through 16, by the General Assembly through the 2015 Session. This volume also contains case annotations reflecting decisions posted to LexisNexis® through April 3, 2015. These annotations will appear in the following traditional reporter sources: Georgia Supreme Court Opinions; Georgia Appeals Court Opinions; Southeastern Reporter, Second Series; Supreme Court Reporter; Federal Reporter, Third Series; Federal Supplement, Second Series; Federal Rules Decisions; and Bankruptcy Reporter. As official and traditional citations become available, substitutions for the LexisNexis® citations will be made.

Additionally, LexisNexis® has prepared annotations and references to Attorney General Opinions, law reviews, and other research sources that we hope will be beneficial as you utilize this product. A complete listing of those sources is as follows: Official and Unofficial Attorney General Opinions; Opinions of the Judicial Qualifications Commission; Advisory Opinions of the State Disciplinary Board of the State Bar; Formal Advisory Opinions of the State Disciplinary Board of the State Bar, issued by the Supreme Court of Georgia; Emory Law Journal; Georgia Law Review; Georgia State University Law Review; John Marshall Law Review; Mercer Law Review; Georgia State Bar Journal; American Law Reports; American Jurisprudence 2d; American Jurisprudence Pleading and Practice; American Jurisprudence Proof of Facts; American Jurisprudence Trials; Corpus Juris Secundum; and Uniform Laws Annotated. Also included, where appropriate, are cross references to the Official Code of Georgia Annotated.

This volume retains amendment notes and effective date notes for Acts passed during the 2013, 2014, and 2015 Sessions of the General Assembly. In order to determine the changes which were made or the effective date applied to a Code section by an Act passed prior to the 2013 Session of the General Assembly, the user should consult the Georgia Laws.

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## **User's Guide**

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the Official Code of Georgia Annotated, a User's Guide containing comments and information on the many features found within the Code has been included in Volume 1 of the Official Code of Georgia Annotated.





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**Law reviews.** — For annual survey article discussing trial practice and procedure, see 51 Mercer L. Rev. 487 (1999). For

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dure and Legal Realism as a Jurisprudence of Law Reform,” see 44 Ga. L. Rev. 433 (2010).

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ARTICLE 1

GENERAL PROVISIONS

JUDICIAL DECISIONS

**Retention of control over orders and judgments.** — Courts of record retain full control over orders and judgments during the term at which the orders and judgments are rendered, and in the exercise of sound discretion may revise or

vacate the orders and judgments, as ends of justice may require, and such discretion, unless manifestly abused, will not be controlled by courts of review; this inherent power of the court extends to all orders and judgments, except those founded



on jury verdicts. *Hall v. First Nat'l Bank*, 87 Ga. App. 142, 73 S.E.2d 252 (1952), cert. denied, 348 U.S. 896, 75 S. Ct. 215, 99 L. Ed. 704 (1954).

### 9-12-1. What verdict to cover.

The verdict shall cover the issues made by the pleadings and shall be for the plaintiff or for the defendant. (Orig. Code 1863, § 3479; Code 1868, § 3501; Code 1873, § 3559; Code 1882, § 3559; Civil Code 1895, § 5329; Civil Code 1910, § 5924; Code 1933, § 110-101.)

## JUDICIAL DECISIONS

**“Cover,”** as used in the context of O.C.G.A. § 9-12-1, means “to treat or deal with inclusively enough for a given purpose.” *Kane v. Cohen*, 182 Ga. App. 485, 356 S.E.2d 94 (1987).

**Given purpose of a jury’s verdict** is the resolution of the issue submitted, not simply an acknowledgment of the controversy submitted. *Kane v. Cohen*, 182 Ga. App. 485, 356 S.E.2d 94 (1987).

**Scope of verdict.** — Verdict must comprehend the whole issue or issues submitted to the jury. *Wood v. Milly McGuire’s Children*, 17 Ga. 361, 63 Am. Dec. 246 (1855).

**Verdict must conform to pleadings and must not be inconsistent.** *Miller v. Ray*, 84 Ga. App. 251, 65 S.E.2d 923 (1951).

**If a verdict and judgment are supported by neither pleadings nor proof, the verdict and judgment are illegal and void.** *Johnson v. Walton*, 236 Ga. 675, 225 S.E.2d 55 (1976).

**Relief cannot be granted for matter not alleged or prayed for** and a verdict and judgment which award relief beyond such pleadings and prayer is illegal and subject to be set aside. This is the general rule in this state, and is based upon the principle that the court pronounces its decree *secundum allegata et probata* (according to what is alleged and proved). *Barbee v. Barbee*, 201 Ga. 763, 41 S.E.2d 126 (1947); *Wade v. Wade*, 122 Ga. 389, 149 S.E.2d 816 (1966); *Pray v. Pray*, 223 Ga. 215, 154 S.E.2d 208 (1967).

**Effect of verdict’s silence on issue.** — Verdict’s silence on issue of pain and suffering demonstrates intent to award plaintiff nothing for this element of dam-

age. *McAfee v. Fickling & Walker Dev. Co.*, 123 Ga. App. 647, 182 S.E.2d 146 (1971).

**Incomplete verdict.** — Verdict finding that the plaintiff was entitled to punitive damages but acknowledging that the jury was unable to determine the amount of such damages was an incomplete verdict. *Kane v. Cohen*, 182 Ga. App. 485, 356 S.E.2d 94 (1987).

**Judge empowered to send jury back into deliberation to clarify verdict.** — When it is determined that verdict was ambiguous, uncertain, or did not cover issues in the case, it is not error for the trial judge to require the jury to return to the juror’s room, under proper instructions, and make the juror’s verdict certain. *Lowery v. Morton*, 200 Ga. 227, 36 S.E.2d 661 (1946).

Whenever a verdict is ambiguous and uncertain in the verdict’s meaning, or does not cover a substantial issue made by the pleadings in the case upon which proof is offered, it is proper to have the jury retire again for the purpose of rendering another verdict, under proper instructions from the court. *Colley v. Dillon*, 158 Ga. App. 416, 280 S.E.2d 425 (1981).

**Court cannot supply substantial omission in verdicts.** *Wood v. Milly McGuire’s Children*, 17 Ga. 361, 63 Am. Dec. 246 (1855); *Mayo v. Keaton*, 78 Ga. 125, 2 S.E. 687 (1886).

**Gratuitous finding by jury on matters not raised by pleadings.** — When part of the verdict in a complaint for land was a gratuitous finding relating to establishment of a line, but was not in conflict with the first part of the verdict which was a finding in favor of the defendant, that part of the verdict upon the only issue that



could have been submitted to the jury, a finding in favor of the defendant, was good and enforceable, and the remaining part of the verdict, dealing with matters not involving any issue raised by the pleadings, was beyond the legitimate province of the jury and would be disregarded as surplusage. *Patterson v. Fountain*, 188 Ga. 473, 4 S.E.2d 38 (1939).

**Construction of general verdict.** — General verdict is to be construed in light of the pleadings, issues made by the evidence, and charge of the court; all presumptions are in the verdict's favor. *Morris v. Bell*, 100 Ga. App. 341, 111 S.E.2d 270 (1959); *Price v. Georgia Indus. Realty Co.*, 132 Ga. App. 107, 207 S.E.2d 556 (1974).

**What general verdict covers.** — When petition alleges both general damages and special damages, a general verdict covers both. *Price v. Georgia Indus. Realty Co.*, 132 Ga. App. 107, 207 S.E.2d 556 (1974).

**Complaint as to amount of verdict.** — There is no principle of law that will justify a defendant in complaining of a verdict against the defendant on the ground that the verdict should have been for a larger amount. *Jones & Phillips, Inc. v. Patrick*, 11 Ga. App. 67, 74 S.E. 700 (1912).

**Effect of verdict when counts are good and bad.** — When there are two good counts in a declaration and one defective count, and evidence on the trial substantially supports allegation in the good counts, and a general verdict is rendered for the plaintiff, intendment of the law is that the jury found their verdict on the good counts and not on the defective count. *Bradshaw v. Perdue*, 12 Ga. 510 (1853).

**Setting aside verdict.** — Verdict will be set aside as contrary to law when the verdict fails to cover all issues made by the pleadings and the proofs submitted in support thereof. *Tompkins v. Corry*, 14 Ga. 118 (1853); *Pickron v. Garrett*, 73 Ga. App. 61, 35 S.E.2d 540 (1945).

Verdict which failed to cover issues made by pleadings and which was too indefinite for enforcement should have been set aside on proper motion for that purpose, made during the term at which

the verdict was rendered, though subsequent to the verdict's reception by the court and the verdict's entry upon the minutes. *Abbott v. Roach*, 113 Ga. 511, 38 S.E. 955 (1901).

**Impropriety of verdict raiseable by motion for new trial.** — Argument that judgment is not authorized by verdict or warranted by pleadings is not a good ground of motion for new trial, but that the verdict does not cover or is contrary to the issues made by the pleadings is a question which may be raised by motion for new trial. *Manry v. Stephens*, 190 Ga. 305, 9 S.E.2d 58 (1940).

That a verdict is contrary to law and contrary to the issues made by the pleadings is a question which may be raised by a motion for new trial. *Hubbard v. Whatley*, 200 Ga. 751, 38 S.E.2d 738 (1946).

**Statutory claim case.** — In trial of a statutory claim case, sole issue is whether property is subject or not subject to the *fi. fa.*, and the verdict in such case, whether found by the jury or directed by the court, cannot stand unless the verdict is so phrased as to determine this issue with definiteness. *Moseley v. Binford*, 31 Ga. App. 513, 121 S.E. 127 (1924).

**Verdict for one defendant against another.** — Verdict for one defendant against another defendant, when there are no pleadings or altercations in the case between the defendants, is void, especially when there is no verdict at all for the plaintiff against either, though the sole issues submitted were between the plaintiff and the defendants. *Maples v. Hoggard*, 58 Ga. 315 (1877).

**Judgments when defendants joined in same action.** — There is no law authorizing separate judgments to be rendered by different tribunals against different defendants, and at different terms when the defendants are joined in the same action. *Norris v. Pollard*, 75 Ga. 358 (1885).

**Entry of decree nunc pro tunc.** — Trial court had authority to enter divorce decree nunc pro tunc as of a date prior to death of a party when the jury had previously returned a verdict and the cause was ripe for judgment. *Moore v. Moore*, 229 Ga. 600, 193 S.E.2d 608 (1972).



**Cure of defects in pleadings by verdict.** — Unless a pleading shows on the pleading's face that a cause of action does not in fact exist or is so utterly defective that it could not be amended at all, or the defect is of such character as renders unenforceable or meaningless a verdict and judgment based thereon, defects in the pleading are cured by the verdict on the theory that there is a conclusive presumption that the jury had before the jury sufficient evidence to authorize the verdict on every essential ingredient necessary for the verdict's rendition which would have been admissible or relevant under

any proper amendment. *Juneau v. Juneau*, 98 Ga. App. 330, 105 S.E.2d 913 (1958).

**Defendant cannot complain of verdict which the defendant has specifically requested.** *Stancil v. State*, 158 Ga. App. 147, 279 S.E.2d 457 (1981).

**Cited in** *Owen v. Anderson*, 54 Ga. App. 53, 186 S.E. 864 (1936); *Calhoun v. Babcock Bros. Lumber Co.*, 199 Ga. 171, 33 S.E.2d 430 (1945); *Gibson v. Gibson*, 204 Ga. 437, 49 S.E.2d 877 (1948); *DOT v. Great S. Enters., Inc.*, 137 Ga. App. 710, 225 S.E.2d 80 (1976).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 75B Am. Jur. 2d, Trial, § 1543 et seq.

**Am. Jur. Pleading and Practice Forms.** — 15 Am. Jur. Pleading and Practice Forms, Judges, § 80.

**C.J.S.** — 89 C.J.S., Trial, § 981 et seq.

**ALR.** — Judgment against executor or administrator qualified in one state as binding upon an executor or administrator of the same decedent, qualified in another, 3 ALR 64.

Power of legislature to set aside or impair judgment, 3 ALR 450.

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Receipt of verdict in civil case in absence of trial judge, 20 ALR2d 281.

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Verdict for money judgment which finds for party for ambiguous or no amount, 49 ALR2d 1328.

Judgment ambiguous or silent as to amount of recovery as defective for lack of certainty, 55 ALR2d 723.

Effect on verdict in civil case of haste or shortness of time in which the jury reached it, 91 ALR2d 1220.

Submission of special interrogatories in connection with general verdict under Federal Rule 49(b), and state counterparts, 6 ALR3d 438.

Verdict-urging instructions in civil case stressing desirability and importance of agreement, 38 ALR3d 1281.

Verdict-urging instructions in civil case commenting on weight of majority view or authorizing compromise, 41 ALR3d 845.



Verdict-urging instructions in civil case admonishing jurors to refrain from intransigence, or reflecting on integrity or intelligence of jurors, 41 ALR3d 1154.

### 9-12-2. Instructions on form of verdict.

In the trial of all civil cases, the judge upon request of the jury shall furnish the jury with written instructions as to the form of their verdict. (Orig. Code 1863, § 3480; Code 1868, § 3502; Code 1873, § 3560; Ga. L. 1880-81, p. 115, § 1; Code 1882, § 3560; Civil Code 1895, § 5330; Civil Code 1910, § 5925; Code 1933, § 110-103.)

## JUDICIAL DECISIONS

**Waiver of objection to verdict.** — Irregularity in form of verdict is waived in absence of objection at time of the verdict's rendition because any formal error can be corrected before the jury is discharged. *Bissell v. State*, 153 Ga. App. 564, 266 S.E.2d 238 (1980).

**Waiver of right to special verdict.** — Party who, after invoking a special verdict, allows a general verdict to be received and published in open court, in the presence of the party's counsel, without objection or motion to have the jury retired with direction to find a special verdict, will be deemed to have waived the right to a special verdict. *Livingston v. Taylor*, 132 Ga. 1, 63 S.E. 694 (1908), overruled on other grounds, *Monteith v. Story*, 255 Ga. 528, 341 S.E.2d 1 (1986).

**Form of verdict.** — When no request

was made for a different form of verdict, it was not error as a matter of law for the court to fail to instruct the jury as to some other form of verdict which was also a correct form. *Fidelity & Cas. Co. v. Mangum*, 102 Ga. App. 311, 116 S.E.2d 326 (1960).

**Harmless error not ground for new trial.** — When the foreperson stated that the jury found "with the auditor," and the jury was polled as to the verdict reached, any error in failing to write out a verdict in favor of the defendant and "against the auditor" was harmless and would not be a ground of a motion for new trial such as to authorize reversal of the case since an error to be harmful must be accompanied by an injury. *Gaulding v. Courts*, 90 Ga. App. 472, 83 S.E.2d 288 (1954).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 75B Am. Jur. 2d, Trial, § 1205 et seq.

**C.J.S.** — 88 C.J.S., Trial, § 645

### 9-12-3. How verdict received.

Verdicts shall be received only in open court in the absence of agreement of the parties. (Orig. Code 1863, § 3486; Code 1868, § 3509; Code 1873, § 3567; Code 1882, § 3567; Civil Code 1895, § 5336; Civil Code 1910, § 5931; Code 1933, § 110-107.)

**Cross references.** — For corresponding provision relating to criminal procedure, see § 17-9-21.



JUDICIAL DECISIONS

**Purpose of section.** — This section is specific authority for receiving verdicts, by agreement, otherwise than in open court. *Malcolm Bros. v. Pollock*, 181 Ga. 687, 183 S.E. 917, answer conformed to, 52 Ga. App. 772, 184 S.E. 659 (1936).

**Return of sealed jury verdict to sheriff per agreement.** — When in a civil case, after the jury has taken the case under advisement and before the jury renders the verdict, the trial judge leaves court and goes to the judge’s home in another county, having directed in open court that the verdict shall be sealed and “returned” to the sheriff, with consent of counsel for both sides, verdict afterward rendered and “returned” to the sheriff and never received in open court or other than

as indicated was not a nullity. *Malcolm Bros. v. Pollock*, 181 Ga. 687, 183 S.E. 917, answer conformed to, 52 Ga. App. 772, 184 S.E. 659 (1936).

**Implied consent to sealed verdict.** — Counsel’s consent to rendition of a sealed verdict in absence of the judge may be implied, when the judge states in the counsel’s presence that, if there is no objection, the judge will be absent from court and go to the judge’s home in another county, and that, should the jury make a verdict, the verdict should be sealed and returned to the sheriff. *Malcolm Bros. v. Pollock*, 52 Ga. App. 772, 184 S.E. 659 (1936).

**Cited in** *Smith v. Jones*, 185 Ga. 236, 194 S.E. 556 (1937).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 75B Am. Jur. 2d, Trial, § 1533 et seq.

**C.J.S.** — 89 C.J.S., Trial, § 992 et seq.

9-12-4. Construction of verdicts.

Verdicts shall have a reasonable intendment and shall receive a reasonable construction. They shall not be avoided unless from necessity. (Orig. Code 1863, § 3481; Code 1868, § 3503; Code 1873, § 3561; Code 1882, § 3561; Civil Code 1895, § 5332; Civil Code 1910, § 5927; Code 1933, § 110-105.)

**Law reviews.** — For comment on *Finch v. State*, 87 Ga. App. 426, 74 S.E.2d 121 (1953), granting defendant a new trial

where the jury returned inconsistent verdicts, see 17 Ga. B.J. 381 (1955).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
CONSTRUCTION OF VERDICT  
AMOUNT OF VERDICT

General Consideration

**Purpose of this section** is to authorize amendment of partially illegal verdict so as to enter a valid final judgment, thereby obviating the necessity of a new trial. *Roswell Road-Perimeter Hwy. Liquor Store, Inc. v. Schurke*, 138 Ga. App.

502, 227 S.E.2d 282 (1976).

**Amendment of verdicts to obviate avoidance.** — To obviate avoidance of verdicts, verdicts may be amended to make the verdicts conform to the pleadings; and when part is illegal, that may be written off. *Central R.R. v. Freeman*, 75 Ga. 331 (1885).



**General Consideration (Cont'd)****Amendment of misnomer in judgment at subsequent court term.** —

When the verdict against the defendant in attachment was in favor of "Albany Hardware & Mill Supply Company" as the plaintiff, judgment rendered thereon against the garnishee which was entered in the name of "Albany Mill Supply Company" was, at a subsequent term of court, amendable on motion of the plaintiff by striking therefrom "Albany Mill Supply Company" as the plaintiff, and substituting therefor "Albany Hardware & Mill Supply Company." *Merchants' Grocery Co. v. Albany Hdwe. & Mill Supply Co.*, 44 Ga. App. 412, 160 S.E. 658 (1931).

**Verdict of the jury should be upheld** if it can be done in accordance with the law. *Bob Lairsey Ins. Agency v. Allen*, 180 Ga. App. 11, 348 S.E.2d 658 (1986).

**Verdict not set aside when no timely objection made.** — Verdict which is not as specific as the verdict could be but which is capable of being reduced to judgment will not be set aside on appeal when no timely objection was made thereto. *Todhunter v. Price*, 248 Ga. 411, 283 S.E.2d 864 (1981).

**Cited in** *Bridges v. Donalson*, 165 Ga. 228, 140 S.E. 497 (1927); *Nottingham v. Nicholson*, 40 Ga. App. 754, 151 S.E. 533 (1930); *Nelson Bros. v. Webb*, 176 Ga. 842, 169 S.E. 111 (1933); *Durden v. Durden*, 58 Ga. App. 46, 197 S.E. 493 (1938); *Davidson v. Turner*, 191 Ga. 197, 12 S.E.2d 308 (1940); *Rushing v. Jones*, 68 Ga. App. 300, 22 S.E.2d 675 (1942); *Pierson v. M. & M. Bus. Co.*, 74 Ga. App. 537, 40 S.E.2d 561 (1946); *Johns v. League, Duvall & Powell, Inc.*, 202 Ga. 868, 45 S.E.2d 211 (1947); *Carawan v. Carawan*, 203 Ga. 325, 46 S.E.2d 588 (1948); *Fields v. Fields*, 203 Ga. 561, 47 S.E.2d 640 (1948); *Finch v. State*, 87 Ga. App. 426, 74 S.E.2d 121 (1953); *Field v. Liberty Mut. Ins. Co.*, 92 Ga. App. 621, 89 S.E.2d 573 (1955); *Taylor v. Taylor*, 212 Ga. 637, 94 S.E.2d 744 (1956); *Rosenthal v. O'Neal*, 108 Ga. App. 54, 132 S.E.2d 150 (1963); *Georgia Power Co. v. Rabun*, 111 Ga. App. 63, 140 S.E.2d 568 (1965); *National Upholstery Co. v. Padgett*, 111 Ga. App. 842, 143 S.E.2d 494 (1965); *Moon v.*

*Moon*, 222 Ga. 650, 151 S.E.2d 714 (1966); *Bateman v. Bateman*, 224 Ga. 20, 159 S.E.2d 387 (1968); *Bragg v. Bragg*, 224 Ga. 294, 161 S.E.2d 313 (1968); *McLane v. McLane*, 224 Ga. 748, 164 S.E.2d 821 (1968); *Norred v. Dispain*, 119 Ga. App. 29, 166 S.E.2d 38 (1969); *Resolute Ins. Co. v. Brayton*, 119 Ga. App. 412, 167 S.E.2d 398 (1969); *Davis v. State*, 119 Ga. App. 740, 168 S.E.2d 784 (1969); *West Ga. Pulpwood & Timber Co. v. Stephens*, 128 Ga. App. 864, 198 S.E.2d 420 (1973); *Fitts v. Fitts*, 231 Ga. 528, 202 S.E.2d 414 (1973); *Jackson v. Riviera Dev. Corp.*, 130 Ga. App. 146, 202 S.E.2d 545 (1973); *Bradley v. Bradley*, 233 Ga. 83, 210 S.E.2d 1 (1974); *Ford Motor Co. v. Lee*, 137 Ga. App. 486, 224 S.E.2d 168 (1976); *Sturdivant v. Polk*, 140 Ga. App. 152, 230 S.E.2d 115 (1976); *Butler v. Butler*, 238 Ga. 292, 232 S.E.2d 562 (1977); *McGarr v. McGarr*, 239 Ga. 640, 238 S.E.2d 427 (1977); *Coleman v. Coleman*, 240 Ga. 417, 240 S.E.2d 870 (1977); *LeBlanc v. Easterwood*, 242 Ga. 99, 249 S.E.2d 567 (1978); *Chandler v. Chandler*, 243 Ga. 496, 255 S.E.2d 11 (1979); *Cotts v. Cotts*, 245 Ga. 138, 263 S.E.2d 163 (1980); *O'Neill v. Western Mtg. Corp.*, 153 Ga. App. 151, 264 S.E.2d 691 (1980); *Brown v. Leasing Int'l, Inc.*, 154 Ga. App. 616, 269 S.E.2d 106 (1980); *Wellington v. Lenkerd Co.*, 157 Ga. App. 755, 278 S.E.2d 458 (1981); *Swish Mfg. S.E., Inc. v. Wilkie*, 158 Ga. App. 275, 279 S.E.2d 724 (1981); *A.C. Gas Serv., Inc. v. Bickley*, 160 Ga. App. 737, 288 S.E.2d 84 (1981); *Preferred Risk Ins. Co. v. Boykin*, 174 Ga. App. 269, 329 S.E.2d 900 (1985); *Rolle v. State*, 177 Ga. App. 79, 338 S.E.2d 519 (1985); *Chrysler Corp. v. Marinari*, 177 Ga. App. 304, 339 S.E.2d 343 (1985); *Fullard v. Southern Mut. Ins. Co.*, 191 Ga. App. 483, 382 S.E.2d 140 (1989); *Redding v. State*, 259 Ga. 871, 389 S.E.2d 227 (1990); *Barnes v. Wall*, 201 Ga. App. 228, 411 S.E.2d 270 (1991); *Macon-Bibb County Bd. of Tax Assessors v. J.C. Penney Co.*, 239 Ga. App. 322, 521 S.E.2d 234 (1999); *Hewitt Assocs., LLC v. Rollins, Inc.*, 308 Ga. App. 848, 708 S.E.2d 697 (2011).

**Construction of Verdict**

**Presumptions in favor of verdict.** — Presumptions are in favor of the validity



of jury verdicts. *Southern Ry. v. Oliver & Morrow*, 1 Ga. App. 734, 58 S.E. 244 (1907); *Browning v. State*, 31 Ga. App. 150, 120 S.E. 649 (1923); *David v. Marbut-Williams Lumber Co.*, 32 Ga. App. 157, 122 S.E. 906 (1924); *North British & Mercantile Ins. Co. v. Parnell*, 53 Ga. App. 178, 185 S.E. 122 (1936); *Beaver v. Magid*, 56 Ga. App. 272, 192 S.E. 497 (1937); *Douglas Motor Co. v. Watson*, 68 Ga. App. 335, 22 S.E.2d 766 (1942); *Rowland v. Gardner*, 79 Ga. App. 153, 53 S.E.2d 198 (1949); *Parks v. Parks*, 89 Ga. App. 725, 80 S.E.2d 837 (1954); *Gough v. Gough*, 238 Ga. 695, 235 S.E.2d 9 (1977).

After rendition of a verdict, all evidence and every presumption and inference arising therefrom must be construed most favorably towards upholding the verdict. *Pepsi Cola Bottling Co. v. First Nat'l Bank*, 248 Ga. 114, 281 S.E.2d 579 (1981).

Jury's verdict should stand. *Shuman v. Strickland Transport-Leasing Co.*, 203 Ga. App. 456, 416 S.E.2d 885 (1992).

**Burden is on the party attacking verdict** to show the verdict's invalidity. *Calhoun v. Babcock Bros. Lumber Co.*, 199 Ga. 171, 33 S.E.2d 430 (1945); *Hunnicutt v. Hunnicutt*, 182 Ga. App. 578, 356 S.E.2d 679 (1987); *Zurich Am. Ins. Co. v. Bruce*, 193 Ga. App. 804, 388 S.E.2d 923 (1989).

**Verdicts should be construed to stand if practicable.** *Swain v. Georgia Power & Light Co.*, 46 Ga. App. 794, 169 S.E. 249 (1933); *Beaver v. Magid*, 56 Ga. App. 272, 192 S.E. 497 (1937); *Douglas Motor Co. v. Watson*, 68 Ga. App. 335, 22 S.E.2d 766 (1942); *Jackson v. Houston*, 200 Ga. 399, 37 S.E.2d 399 (1946); *Powell v. Moore*, 202 Ga. 62, 42 S.E.2d 110 (1947); *Rowland v. Gardner*, 79 Ga. App. 153, 53 S.E.2d 198 (1949); *Parks v. Parks*, 89 Ga. App. 725, 80 S.E.2d 837 (1954); *Minor v. Ray*, 127 Ga. App. 1, 193 S.E.2d 41 (1972); *King v. Cox*, 130 Ga. App. 91, 202 S.E.2d 216 (1973); *Jordan v. Ellis*, 148 Ga. App. 286, 250 S.E.2d 859 (1978); *Shipman v. Horizon Corp.*, 151 Ga. App. 242, 259 S.E.2d 221 (1979); *Suber v. Fountain*, 151 Ga. App. 283, 259 S.E.2d 685 (1979); *Herman v. Boyer*, 154 Ga. App. 617, 269 S.E.2d 107 (1980).

**Verdict is certain if verdict can be made certain.** *Giles ex rel. Jaques &*

*Johnson v. Spinks*, 64 Ga. 205 (1879); *Cox v. State*, 79 Ga. App. 202, 53 S.E.2d 221 (1949).

**How to make verdict certain.** — Verdict may be made certain by what it contains or by the record. *Rouse v. Chance & Hopkins*, 27 Ga. App. 256, 108 S.E. 65 (1921); *Smith v. Cooper*, 161 Ga. 594, 131 S.E. 478 (1926); *Swain v. Georgia Power & Light Co.*, 46 Ga. App. 794, 169 S.E. 249 (1933); *Owen v. Anderson*, 54 Ga. App. 53, 186 S.E. 864 (1936); *Harrell v. Bowman*, 69 Ga. App. 881, 27 S.E.2d 50 (1943); *Jackson v. Houston*, 200 Ga. 399, 37 S.E.2d 399 (1946); *Minor v. Ray*, 127 Ga. App. 1, 193 S.E.2d 41 (1972); *King v. Cox*, 130 Ga. App. 91, 202 S.E.2d 216 (1973).

**Matters considered in construing verdict.** — Verdicts will be construed in light of the pleadings, issues made by the evidence, and the charge of the court. *Harvey v. Head*, 68 Ga. 247 (1881); *Seifert v. Holt*, 82 Ga. 757, 9 S.E. 843 (1889); *Tifton, T. & G. Ry. v. Butler*, 4 Ga. App. 191, 60 S.E. 1087 (1908); *David v. Tucker*, 140 Ga. 240, 78 S.E. 909 (1913); *Browning v. State*, 31 Ga. App. 150, 120 S.E. 649 (1923); *McMillan v. Rodgers*, 32 Ga. App. 647, 124 S.E. 354 (1924); *Swain v. Georgia Power & Light Co.*, 46 Ga. App. 794, 169 S.E. 249 (1933); *Story v. Howell*, 85 Ga. App. 661, 70 S.E.2d 29 (1952); *Wade v. Wade*, 222 Ga. 389, 149 S.E.2d 816 (1966); *Gough v. Gough*, 238 Ga. 695, 235 S.E.2d 9 (1977).

**Construction of verdict** may be aided by consideration of pleadings and undisputed facts proved upon trial, but this rule of construction is to be resorted to only when the intent of the jury is not reasonably apparent from the language of the verdict itself. *Ryner v. Duke*, 205 Ga. 280, 53 S.E.2d 362 (1949).

**Trial court's construction of verdict authorized.** — Trial court could find that by returning a verdict "in favor of the plaintiffs" in a medical malpractice suit brought by the parents for the wrongful death of a child, rather than "in favor of the defendant," the jury found that the doctor had breached a duty of care owed to the parents, that the doctor had been negligent, and that any contributory negligence by the mother was not the sole proximate cause of the child's death, but



**Construction of Verdict (Cont'd)**

that the parents should not recover damages. *Roberts v. Aderhold*, 273 Ga. App. 642, 615 S.E.2d 761 (2005).

**What constitutes sufficient verdict.**

— Verdict which may, by reasonable construction, be understood, and on which legal judgment can be entered, is sufficient. *Williams, Birnie & Co. v. Brown*, 57 Ga. 304 (1876); *Peninsular Naval Stores Co. v. State*, 20 Ga. App. 501, 93 S.E. 159, cert. denied, 20 Ga. App. 832, 93 S.E. 159 (1917); *Swain v. Georgia Power & Light Co.*, 46 Ga. App. 794, 169 S.E. 249 (1933); *Harrell v. Bowman*, 69 Ga. App. 881, 27 S.E.2d 50 (1943); *Jackson v. Houston*, 200 Ga. 399, 37 S.E.2d 399 (1946).

**Verdicts capable of reduction to reasonable certainty.** — Verdicts are not to be set aside for indefiniteness if capable of being reduced to reasonable certainty by an application of ordinary canons of construction. *Monk-Sloan Supply Co. v. Quitman Oil Co.*, 10 Ga. App. 390, 73 S.E. 522 (1912).

Verdicts are to be given a reasonable intendment and are not to be rendered ineffectual when the true meaning of the finding can be readily ascertained; in every instance, a verdict should be construed in the light of the maxim that that is certain which can be rendered certain. *Owen v. Anderson*, 54 Ga. App. 53, 186 S.E. 864 (1936); *Cox v. State*, 79 Ga. App. 202, 53 S.E.2d 221 (1949).

**Verdicts are to be given a reasonable intendment.** *Gragg v. Hall*, 164 Ga. 628, 139 S.E. 339 (1927).

**Verdicts are to be upheld if capable of legal intendment,** construed in light of the pleadings, the issues made by the evidence, and the charge of the court; the presumptions are in favor of the validity of a verdict, and if possible a construction will be given that will uphold the verdict. *Pickron v. Garrett*, 73 Ga. App. 61, 35 S.E.2d 540 (1945).

**Reasonable intendment.** — Even though the verdict is somewhat confused, by a reasonable intendment the verdict may stand. *Horne v. Guiser Mfg. Co.*, 74 Ga. 790 (1885).

Although a verdict may not be explicit or definite in the verdict's terms, if its

intent is apparent from the pleadings and evidence, it must be construed with reference thereto. *Jones v. Empire Furn. Co.*, 40 Ga. App. 556, 150 S.E. 563 (1929); *Nottingham v. Nicholson*, 42 Ga. App. 628, 157 S.E. 118 (1931); *Dunson v. Harris*, 45 Ga. App. 450, 164 S.E. 910 (1932); *Powell v. Moore*, 202 Ga. 62, 42 S.E.2d 110 (1947); *Carithers v. Carithers*, 202 Ga. 596, 43 S.E.2d 503 (1947); *Sheldon v. Hargrope*, 213 Ga. 672, 100 S.E.2d 898 (1957); *Minor v. Ray*, 127 Ga. App. 1, 193 S.E.2d 41 (1972); *Carlson v. Holt*, 152 Ga. App. 95, 262 S.E.2d 508 (1979).

**How to determine reasonable intendment.** — In determining "reasonable intendment" of jury verdicts courts look to pleadings, issues made by evidence at trial, and charge of the court. *Lingerfelt v. Hufstetler*, 137 Ga. App. 723, 224 S.E.2d 827 (1976).

**Plain verdict must speak for itself.**

— When the verdict is plain and unmistakable in the verdict's legal effect, the verdict must speak for itself, unaided by any consideration of pleadings and facts proved upon trial for construction thereof. *Turner v. Shackelford*, 39 Ga. App. 49, 145 S.E. 913 (1928); *Ryner v. Duke*, 205 Ga. 280, 53 S.E.2d 362 (1949); *Jolly v. Jolly*, 137 Ga. App. 625, 224 S.E.2d 807 (1976).

**Verdict which is not ambiguous must speak for itself.** *Anderson v. Green*, 46 Ga. 361 (1872).

**Uncertain verdict may be void.** — Verdict which is too uncertain to be basis of valid decree is void. *Taylor v. Taylor*, 195 Ga. 711, 25 S.E.2d 506 (1943).

**Verdict that is contradictory and repugnant is void,** and no valid judgment can be entered thereon; a judgment entered on such verdict will be set aside. *Pickron v. Garrett*, 73 Ga. App. 61, 35 S.E.2d 540 (1945); *Thompson v. Ingram*, 226 Ga. 668, 177 S.E.2d 61 (1970); *Four Oaks Homes, Inc. v. Smith*, 153 Ga. App. 326, 265 S.E.2d 76 (1980).

**Contradictory verdict argument rejected.** — In the client's action against an attorney, alleging that the attorney obtained title to the client's house by fraud, the trial court properly denied the attorney's motion for a directed verdict and allowed the jury to decide if the client failed to exercise due diligence by failing



to read papers the attorney gave the client to sign, and the appellate court rejected the argument that the jury's verdict was contradictory because the jury found the attorney liable for fraud in tort but not fraud in equity. *Queen v. Lambert*, 259 Ga. App. 385, 577 S.E.2d 72 (2003).

**Judgment must accord with intent of verdict.** — Judgment entered on verdict must follow true meaning and intent thereof; and when the judgment fails to do this and it is not possible to frame a judgment in accordance both with the true intent of the verdict and with the issues made by the pleadings, the verdict as rendered cannot be upheld. *Garrett v. Wall*, 29 Ga. App. 642, 116 S.E. 331 (1923).

**Party could not redraft verdict.** — Jury found a breach of the duty of good faith, but did not find that a broker was the procuring cause of a lease negotiated by a corporation, or that the broker was entitled to recover in quantum meruit, which left the verdict for breach of the duty of good faith that the broker had abandoned; the broker was not allowed to redraft the verdict form that it presented to include a finding on procuring cause or quantum meruit and, thus, the corporation was entitled to judgment notwithstanding the verdict. *Quantum Trading Corp. v. Forum Realty Corp.*, 278 Ga. App. 485, 629 S.E.2d 420 (2006).

**Jury may be ordered to further deliberate void verdict.** — When an inconsistent and void verdict is returned by the jury, it is proper for the judge to refuse to receive the verdict, and to require the jury to return for further deliberations. *Thompson v. Ingram*, 226 Ga. 668, 177 S.E.2d 61 (1970); *Kemp v. Bell-View, Inc.*, 179 Ga. App. 577, 346 S.E.2d 923 (1986).

**Facts mandating affirmance of verdict on review.** — When only question for determination regarding verdict requires consideration of the evidence, and when no transcript of the evidence is contained in the record, judgment of the trial court must be affirmed. *King v. Cox*, 130 Ga. App. 91, 202 S.E.2d 216 (1973).

**Verdict repugnant which exonerates true culprit but punishes mere participants.** — Verdict, exonerating one defendant in a trespass suit seeking damages for timber cut who actually commit-

ted the alleged trespass, and relieving that one defendant of all liability, and assessing damages against the other defendants who participated in the alleged actual trespass only through the acts of the defendant relieved, is inconsistent, repugnant, and must be set aside as null and void. *Pickron v. Garrett*, 73 Ga. App. 61, 35 S.E.2d 540 (1945).

**Substantial certainty to common and reasonable intent essential.** — Verdicts are to be construed in light of pleadings and evidence, and all that is essential to a valid verdict is substantial certainty to a common and reasonable intent. *Short v. Cofer*, 161 Ga. 587, 131 S.E. 362 (1926); *Jackson v. Houston*, 200 Ga. 399, 37 S.E.2d 399 (1946); *Powell v. Moore*, 202 Ga. 62, 42 S.E.2d 110 (1947); *King v. Cox*, 130 Ga. App. 91, 202 S.E.2d 216 (1973); *Patterson v. Loggins*, 142 Ga. App. 868, 237 S.E.2d 469 (1977).

**When verdict is ambiguous and susceptible of two constructions,** one of which would uphold the verdict, and one of which would defeat the verdict, the verdict will not on this account be set aside, but will be given a construction which will uphold the verdict. *Atlantic & B. Ry. v. Brown*, 129 Ga. 622, 59 S.E. 278 (1907); *David v. Marbut-Williams Lumber Co.*, 32 Ga. App. 157, 122 S.E. 906 (1924); *Beaver v. Magid*, 56 Ga. App. 272, 192 S.E. 497 (1937); *Calhoun v. Babcock Bros. Lumber Co.*, 199 Ga. 171, 33 S.E.2d 430 (1945); *Rowland v. Gardner*, 79 Ga. App. 153, 53 S.E.2d 198 (1949); *Parks v. Parks*, 89 Ga. App. 725, 80 S.E.2d 837 (1954); *Buck Creek Indus., Inc. v. Williams-East, Inc.*, 130 Ga. App. 813, 204 S.E.2d 787 (1974); *Brown v. Techdata Corp.*, 238 Ga. 622, 234 S.E.2d 787 (1977); *Jordan v. Ellis*, 148 Ga. App. 286, 250 S.E.2d 859 (1978); *Suber v. Fountain*, 151 Ga. App. 283, 259 S.E.2d 685 (1979).

**Use of criminal verdict form in civil case.** — Fact that the form used by the jury in a civil case was the form generally used in criminal cases was not enough to invalidate the verdict if by inspection or by reasonable construction the court may apprehend the verdict's intendment. *Haughton v. Judsen*, 116 Ga. App. 308, 157 S.E.2d 297 (1967).

**Surplusage and immaterial findings.** — Verdicts are to be upheld if capa-



**Construction of Verdict (Cont'd)**

ble of legal intendment, and surplusage or immaterial findings included may be disregarded. *Tifton, T. & G. Ry. v. Butler*, 4 Ga. App. 191, 60 S.E. 1087 (1908); *McAfee v. Fickling & Walker Dev. Co.*, 123 Ga. App. 647, 182 S.E.2d 146 (1971).

**Saving verdict by rejecting surplusage which causes indefiniteness.** — Maxim, “utile per inutile non vitiatur” (the useful is not vitiated by the useless), authorizes rejection of surplusage, and saves from imputation of uncertainty a verdict which is definite, complete, and certain upon rejection of the surplusage in which indefiniteness inheres. *Monk-Sloan Supply Co. v. Quitman Oil Co.*, 10 Ga. App. 390, 73 S.E. 522 (1912); *McMillan v. Rodgers*, 32 Ga. App. 647, 124 S.E. 354 (1924).

**Disregarding surplusage not error.** — When verdict stated “From the evidence presented we find equal negligence on the part of both parties, therefore, we conclude no verdict,” judge did not err in entering judgment by disregarding words “no verdict,” which were surplusage. *Hales v. Sandersville Bldrs. Supply Co.*, 127 Ga. App. 558, 194 S.E.2d 281 (1972).

**When part of verdict in complaint for land was gratuitous finding** relating to establishment of a line, but was not in conflict with the first part of the verdict which was a finding in favor of the defendant, that part of the verdict upon the only issue that could have been submitted to the jury, a finding in favor of the defendant, was good and enforceable, and the remaining part of the verdict, dealing with matters not involving any issue raised by the pleadings, was beyond the legitimate province of the jury and would be disregarded as surplusage. *Patterson v. Fountain*, 188 Ga. 473, 4 S.E.2d 38 (1939).

**Singular includes plural.** — Under common canon of construction that singular or plural number each includes the other, unless the contrary plainly appears from the context, a verdict finding in favor of “the defendant” will be construed as a finding in favor of all defendants when an action is against two or more persons. *Monk-Sloan Supply Co. v. Quitman Oil Co.*, 10 Ga. App. 390, 73 S.E. 522 (1912);

*Neda Constr. Co. v. Jenkins*, 137 Ga. App. 344, 223 S.E.2d 732 (1976); *Carlson v. Holt*, 152 Ga. App. 95, 262 S.E.2d 508 (1979).

**Exception demanding construction of verdict and judgment against one defendant.** — When daughter-in-law brings trover action against the mother-in-law and father-in-law to recover the value of the automobile and the mother-in-law denied that she was in possession of the automobile and denied that she claimed any title to the automobile, thereby disclaiming any interest in the litigation, and the father-in-law admitted possession and claimed title to the automobile, and the trial court entered judgment for the daughter-in-law, the Court of Appeals, on writ of error, would construe the verdict and judgment as against the father-in-law only. *Parks v. Parks*, 89 Ga. App. 725, 80 S.E.2d 837 (1954).

**Verdict finding property subject to mortgage execution properly construed.** — When the only issue involved in a case was whether the particular property levied upon was subject to the plaintiff’s mortgage execution, and which verdict was in the language “we, the jury, find the property of the defendant is subject to the fi. fa.,” was properly construed as a verdict finding the subject property levied upon. *Dunson v. Harris*, 45 Ga. App. 450, 164 S.E. 910 (1932).

**Verdict silent on issue of pain and suffering** demonstrates intent to award the plaintiff nothing for this element of damage. *McAfee v. Fickling & Walker Dev. Co.*, 123 Ga. App. 647, 182 S.E.2d 146 (1971).

**Failure to specify amount in verdict** did not render void for uncertainty a verdict for the plaintiff in an action for a stated sum and interest thereon to which there was a plea of set-off. *Southern Fittings & Foundry Co. v. Warfield*, 18 Ga. App. 283, 89 S.E. 376 (1916).

**Dollar amount not specified but capable of calculation.** — When verdict was for amount on face of note, and for interest to date of verdict, less credits on note, and an inspection of these credits showed the amount to be deducted, leaving the verdict as a net balance, if the verdict was not certain, the verdict could



easily have been made certain. *Smith v. Hightower*, 3 Ga. App. 197, 59 S.E. 593 (1907).

**Verdict rendered on trial of consolidated issues**, finding for the plaintiff a given sum, was not so vague, indefinite, and uncertain as to render judgments entered therein void. *Paulk v. South Ga. Bldg. & Inv. Co.*, 152 Ga. 646, 111 S.E. 26 (1922).

**Interpretation of misnomer in verdict.** — When there is a close connection between a defendant and a corporation of which the defendant is majority owner and president, and the fact that on numerous occasions the plaintiff's rebuttal witness and on at least one occasion the plaintiff's attorney, referred to the company as "he," as if an individual defendant personified it, the reasonable intention of a verdict awarding "him" the sum of \$2,000.00, when the individual owner had no counterclaim, is that the company should take \$2,000.00 on one of the company's counterclaims. *Buck Creek Indus., Inc. v. Williams-East, Inc.*, 130 Ga. App. 813, 204 S.E.2d 787 (1974).

**Amount of damages capable of ascertainment.** — When measure of damages was correctly stated by the court to the jury, a new trial will not be granted because the verdict separated the amount of damage under the three heads of items named, the aggregate amount being amply supported by the evidence. Such verdict was sufficiently clear, certain, and definite. *Telfair County v. Clements*, 1 Ga. App. 437, 57 S.E. 1059 (1907).

**Disregarding recommendation proper.** — When, upon trial of action to enjoin city from enforcing a fi. fa. for back taxes, a verdict is returned in favor of the city, but added to the verdict is a recommendation that past taxes be waived, the recommendation is purely surplusage without legal meaning or effect; and the court properly disregarded such recommendation and entered judgment in accord with the actual verdict refusing an injunction. *Morrison v. Smith*, 208 Ga. 521, 67 S.E.2d 577 (1951).

**Restriction on verdict changes by reassembled jury.** — After jury has published verdict and dispersed, their expressions, on being reassembled, as to its

intent could not change plain import and intent of the verdict. *Ryner v. Duke*, 205 Ga. 280, 53 S.E.2d 362 (1949).

### Amount of Verdict

**Verdict reciting one amount in figures and another amount in words** will be construed as a verdict in amount represented by the words, in the absence of a manifest intention to the contrary. *Southeastern Greyhound Lines v. Fisher*, 72 Ga. App. 717, 34 S.E.2d 906 (1945).

**Total principal and interest stated.** — Verdict finding a certain principal and interest and stating the total, although irregular, is not illegal. *Tifton, T. & G. Ry. v. Butler*, 4 Ga. App. 191, 60 S.E. 1087 (1908).

**Verdict finding liability but failing to indicate an award** of either no damages or a sum of damages was illegal and void since the jury's explanation of such failure indicated the jury's confusion as to the damages issue as well as the jury's intent to make some award of damages. *Rucker v. Camden Tel. & Tel. Co.*, 181 Ga. App. 504, 353 S.E.2d 50 (1987).

**When substantial justice was done, and verdict was for about the right amount**, and the objection turned upon a purely technical idea, the court allowed the verdict to stand. *Horne v. Guiser Mfg. Co.*, 74 Ga. 790 (1885).

**Lump sum not void for uncertainty.** — When a verdict is supported by evidence on both counts sued on, the verdict is not void for uncertainty and ambiguity because the verdict is in a lump sum based on the two counts. *Rowland v. Gardner*, 79 Ga. App. 153, 53 S.E.2d 198 (1949).

**Construction of verdict in trover action.** — Verdict in a trover action which reads, "We, the jury, find the property in dispute in favor of the defendant," will, at the instance of the defendant, be construed as a verdict finding for the defendant or the value of the property in the amount established by the plaintiff's affidavit for bail, which is corroborated by the plaintiff's own personal testimony upon trial. This is true although the defendant may not, prior to rendition of the verdict, have elected to take a verdict for the value of the property. *Pound v. Baldwin*, 34 Ga.



**Amount of Verdict (Cont'd)**

App. 810, 131 S.E. 291 (1926).

**Trespass award not excessive.** — In a trespass counterclaim, a jury's award of \$22,000 properly withstood motions for relief from judgment because there was evidence to support the verdict and even if

the award, which had not been specifically enumerated as general or nominal damages, was awarded as nominal damages, such damages could vary widely in Georgia and were not subject to being set aside based solely on the amount. *Wright v. Wilcox*, 262 Ga. App. 659, 586 S.E.2d 364 (2003).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 75B Am. Jur. 2d, Trial, § 1545.

**C.J.S.** — 89 C.J.S., Trial, §§ 1083 et seq., 1175 et seq.

**ALR.** — Validity and effect of verdict in civil action finding defendant "not guilty," 7 ALR2d 1341.

Verdict for money judgment which finds for party for ambiguous or no amount, 49 ALR2d 1328.

Validity of verdict awarding medical expenses to personal injury plaintiff, but failing to award damages for pain and suffering, 55 ALR4th 186.

**9-12-5. Verdict may be molded.**

In a proper case, the superior court may mold the verdict so as to do full justice to the parties in the same manner as a decree in equity. (Orig. Code 1863, § 3482; Code 1868, § 3504; Code 1873, § 3562; Code 1882, § 3562; Civil Code 1895, § 5333; Civil Code 1910, § 5928; Code 1933, § 110-106.)

**JUDICIAL DECISIONS**

**Distinguishes with O.C.G.A. § 23-4-31.** — Former Civil Code 1933, § 110-106 (see now O.C.G.A. § 9-12-5) allowed the trial court to mold the verdict so as to do full justice to the parties, while under former Code 1933, § 37-1203 (see now O.C.G.A. § 23-4-31), the court could mold the court's decrees so as to meet the exigencies of each case. *Cotts v. Cotts*, 245 Ga. 138, 263 S.E.2d 163 (1980).

**Guidelines as to molding decrees.** — Superior court is authorized to have the jury so mold a verdict as to do justice to the parties in the same manner as a decree in equity and the court may mold a decree so as to meet the exigencies of each case. *Central R.R. v. First Nat'l Bank*, 73 Ga. 383 (1884).

**Damage award could not be "molded."** — When a trial judge attempted to amend the jury's verdict, after the jury had dispersed, regarding a matter of substance, the award of damages, this action exceeded the authority vested

by law in the trial judge to "mold" the verdict, and thus could not be sustained. *Force v. McGeachy*, 186 Ga. App. 781, 368 S.E.2d 777 (1988).

After the insured's home was severely damaged by fire, and the insured was awarded a jury verdict against the insurer for the insured's loss, the trial court erred in increasing the amount of damages for the loss of the plaintiff's home, but did not err in refusing to modify the jury's set-off for mortgage payments made by the insurer as this would have been an unauthorized "molding" of the jury's verdict. *Allstate Ins. Co. v. Durham*, 194 Ga. App. 867, 392 S.E.2d 53 (1990).

In a proper case, the superior court may mold the verdict so as to do justice. However, after the jury's verdict has been received and recorded and the jury has been dispersed, a verdict may not be amended regarding a matter of substance such as an award of damages. *Crawford v. Presbyterian Home, Inc.*, 216 Ga. App. 54, 453 S.E.2d 480 (1995).



Trial court did not err by refusing to enter a judgment molding with a jury's verdict to correct an alleged illegality and inconsistency in the damages award because under O.C.G.A. § 9-12-7 the trial court had no authority to mold the verdict since an increase in damages was a matter of substance, not mere form; a plumbing contractor was not without a potential remedy if the contractor believed that the jury's verdict was incorrect because, after the return of the verdict but before the dispersal of the jury, the plumbing contractor could have argued that the jury's damage award was illegal and internally inconsistent and could have requested the trial court to give additional instructions and permit the jury to consider the matter again, and alternatively, after the jury was dispersed, the plumbing contractor could have asked for a new trial on the issue of damages or to conditionally grant a new trial under the court's power of additur under O.C.G.A. § 51-12-12. *Gill Plumbing Co. v. Jimenez*, 310 Ga. App. 863, 714 S.E.2d 342 (2011), cert. denied, No. S11C1826, 2011 Ga. LEXIS 966 (Ga. 2011).

**Molding judgment to allow enforcement of right.** — Lower courts can mold their judgments so as to enable the plaintiff to enforce the plaintiff's right. *Alvaton Mercantile Co. v. Caldwell*, 156 Ga. 317, 119 S.E. 25 (1923); *Alvaton Mercantile Co. v. Caldwell*, 31 Ga. App. 195, 120 S.E. 448 (1923).

**City courts can exercise power conferred by this section.** *Rylee v. Bank of Statham*, 7 Ga. App. 489, 67 S.E. 383 (1910); *Alvaton Mercantile Co. v. Caldwell*, 156 Ga. 317, 119 S.E. 25 (1923).

**Molding of verdict pertaining to land.** — Verdict can be so molded as to compel the defendant to surrender possession of the land, and to place the parties in the same condition in which the parties were before the contract was made. *Sizemore v. Pinkston*, 51 Ga. 398 (1874).

Although a jury's verdict did not describe the boundary line between two neighbors, the trial court's judgment establishing the boundary line between the parties' respective properties using a plat submitted by the prevailing owner did not substantively change the verdict but sim-

ply molded the verdict to do justice to the parties as permitted by O.C.G.A. § 9-12-5. *Mathews v. Cloud*, 294 Ga. 415, 754 S.E.2d 70 (2014).

**Sale of railroad property under execution.** — While all the property of a railroad company was subject to be applied to payment of its just debts, and may be sold for that purpose under a judgment at law, the judgment and the execution founded thereon must be specially molded in compliance with former Civil Code 1910, §§ 5928 and 6025 (see now O.C.G.A. §§ 9-12-5 and 9-13-4), and a sale under an execution not so molded, about to be made by the sheriff, may be arrested by an affidavit of illegality interposed by the corporation through the corporation's proper officers. *Ocilla S.R.R. v. Morton*, 17 Ga. App. 703, 87 S.E. 1088 (1916).

**Attachment of disputed land to mold verdict.** — When a plat of disputed property is not introduced in evidence, but there is sufficient evidence produced at trial to identify the plat as the disputed tract of land, the trial judge may attach the plat to mold the verdict so as to do full justice to the parties. *Mathews v. Penley*, 242 Ga. 192, 249 S.E.2d 552 (1978), cert. denied, 440 U.S. 924, 99 S. Ct. 1255, 59 L. Ed. 2d 478 (1979).

**Continuing nuisance.** — Trial court was entitled to enter an order molding the verdict in a continuing nuisance case pursuant to O.C.G.A. § 9-12-5 as doing so was necessary to do full justice to the parties; order entered three months after judgment did not modify the judgment in any matter of substance not contemplated by the parties at the time the judgment was entered. *City of Columbus v. Barngrover*, 250 Ga. App. 589, 552 S.E.2d 536 (2001).

**Time for molding verdict.** — When the verdict has been received and published and the jury has dispersed, the judge cannot amend or reform the verdict in any matter of substance. *Harlan v. Ellis*, 198 Ga. 678, 32 S.E.2d 389 (1944).

**Subtracting from verdict's finding.** — After dispersal of the jury, the judge has no power either to add to or take from the jury's finding, and has no power, by amendment or reformation, to supply substantial omissions or make substantial



changes in the verdict as rendered by the jury. *Fried v. Fried*, 208 Ga. 861, 69 S.E.2d 862 (1952).

**Decree substantially modifying findings of jury.** — Judge cannot accomplish the same result as amending a verdict in a matter of substance by entering a decree different from the jury verdict, thereby eliminating certain substantial findings of the verdict, and substantially modifying or changing other findings of the jury. *Fried v. Fried*, 208 Ga. 861, 69 S.E.2d 862 (1952).

**Disregarding surplusage in verdict held proper.** — When, upon the trial of a suit to enjoin a city from enforcing a *feri facias* for back taxes, a verdict is returned in favor of the city, but added to the verdict is a recommendation that the past taxes be waived, the recommendation is surplusage without legal meaning or effect; and the court properly disregarded such recommendation and entered judgment in accord with the actual verdict refusing an injunction. *Morrison v. Smith*, 208 Ga. 521, 67 S.E.2d 577 (1951).

**Judge held to have erred in striking jury's findings.** — When the jury found for plaintiff punitive damages and attorney's fees, but no actual damages, the judge erred in granting the defendants' motion to strike the jury's findings as surplusage and in entering a judgment for the defendants since a verdict may not be set aside or substantially changed except upon a motion for new trial, or its equivalent. *Parrish Bakeries of Ga., Inc. v. Wiseman Baking Co.*, 104 Ga. App. 573, 122 S.E.2d 260 (1961).

**Stipulation by parties as to jury's award.** — Ordinarily, jury or court may not award relief to persons not parties to the litigation, but when parties stipulated that the jury might award the interest of either party in certain property to the other for life, with a remainder over upon death, neither can be heard to complain of the verdict. *McGill v. McGill*, 247 Ga. 428, 276 S.E.2d 587 (1981).

**Verdict in the singular construed to include all defendants.** — Verdicts are not to be set aside for indefiniteness if the verdicts are capable of being reduced to a reasonable certainty by application of the ordinary canons of construction. Under the common canons of construction, the singular and the plural each includes the other, unless the contrary plainly appears from the context. Thus, a verdict involving the defendant will be construed as a finding involving all the defendants when the suit is against two or more persons. *Neda Constr. Co. v. Jenkins*, 137 Ga. App. 344, 223 S.E.2d 732 (1976).

**Creation of trust for child support intended by verdict.** — When, in a divorce case, the jury clearly intended to create a trust for the purpose of providing support for a minor child during the minor's minority and the jury also intended that there be monthly payments from the trust for the use of the child, but the husband failed to take any substantive steps to set up the trust, there was no error in the trial court naming a trustee and providing the necessary provisions to effectuate the trust for the purpose of providing monthly child support, such as requiring the husband to make the payments necessary to keep current on his obligations for his share of the debts, encumbrances, and maintenance of the trust property. *Aycock v. Aycock*, 251 Ga. 104, 303 S.E.2d 456 (1983).

**Cited in** *Ottatouchee Sav. Bank v. Elliott*, 172 Ga. 656, 158 S.E. 316 (1931); *Jarecky v. Arnold*, 51 Ga. App. 954, 182 S.E. 66 (1935); *Sawyer Coal & Ice Co. v. Kinnett-Odom Co.*, 192 Ga. 166, 14 S.E.2d 879 (1941); *Moon v. Moon*, 222 Ga. 650, 151 S.E.2d 714 (1966); *Bradley v. Bradley*, 233 Ga. 83, 210 S.E.2d 1 (1974); *Ford Motor Co. v. Lee*, 137 Ga. App. 486, 224 S.E.2d 168 (1976); *Swicord v. Hester*, 240 Ga. 484, 241 S.E.2d 242 (1978); *Solomon v. Solomon*, 241 Ga. 188, 244 S.E.2d 2 (1978); *Rental Equip. Group, LLC v. Maci, LLC*, 263 Ga. App. 155, 587 S.E.2d 364 (2003).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 75B Am. Jur. 2d, Trial, § 1612 et seq.

**C.J.S.** — 89 C.J.S., Trial, §§ 1074 et seq., 1166 et seq.



**ALR.** — Constitutionality, construction, and application of statutes empowering court to require judgment debtor to make payment out of income or by installments, 111 ALR 392.

Power of trial court or appellate court to correct former's misinterpretation of jury's verdict, 160 ALR 457

Power of appellate court to remit portion of verdict or judgment covering period barred by statute of limitations, 26 ALR2d 956.

Verdict for money judgment which finds for party for ambiguous or no amount, 49 ALR2d 1328.

Court's power to increase amount of verdict or judgment over either party's refusal or failure to consent to addition, 56 ALR2d 213.

Validity of verdict awarding medical expenses to personal injury plaintiff, but failing to award damages for pain and suffering, 55 ALR4th 186.

## 9-12-6. Amendment of verdict — To conform to pleadings.

A verdict may be so amended as to make it conform to the pleadings if the error plainly appears upon the face of the record. (Orig. Code 1863, § 3421; Code 1868, § 3441; Code 1873, § 3491; Code 1882, § 3491; Civil Code 1895, § 5110; Civil Code 1910, § 5694; Code 1933, § 110-110.)

## JUDICIAL DECISIONS

**Jury having rendered a verdict for a lump sum** which was larger than that authorized by the pleadings, it was not erroneous to instruct the jury to again retire and return a verdict for so much principal and so much interest. *Ginn v. Carithers*, 14 Ga. App. 298, 80 S.E. 698 (1914).

**Separating amount of principal and interest.** — Amendment of verdict authorized so as to separate the amount of principal and interest in a lump sum verdict. *Morgan v. J.B. Colt Co.*, 34 Ga. App. 630, 130 S.E. 600 (1925).

**Framing verdict by court proper.** — When the foreperson states that the jury's intention was to allow interest, insurance, taxes, and attorney's fees, but these items were not included, it is proper for the court to so frame the verdict. *Doster v. Brown*, 52 Ga. 543 (1874); *Morgan v. Coleman*, 139 Ga. 459, 77 S.E. 579 (1913).

**Attorney's fees.** — When the amount of jury finding does not include attorney's fees, it is proper to require the jury to find attorney's fees. *Smith v. Pilcher*, 130 Ga. 350, 60 S.E. 1000 (1908).

It is proper for court to have jury separate according to principal and interest counsel fees in verdict. *Smith v. Pilcher*, 130 Ga. 350, 60 S.E. 1000 (1908).

**As to instance when execution of contract for payment of attorney fees improper**, see *Lester v. Mathews*, 56 Ga. 655 (1876); *City & Suburban Ry. v. Brauss*, 70 Ga. 368 (1883).

**Indefinite or ambiguous verdict requires correction.** — It is the right and duty of the trial judge to call the attention of the jury to an indefinite or ambiguous verdict and to require the jury to return to the jury room and correct the verdict. *Jordan v. Downs*, 118 Ga. 544, 45 S.E. 439 (1903); *Smith v. Pilcher*, 130 Ga. 350, 60 S.E. 1000 (1908).

**Rule on correction is the same when the verdict is incomplete.** *Lee v. Humphries*, 124 Ga. 539, 52 S.E. 1007 (1905).

**Writing off part of verdict.** — Judge could correct certain errors in the verdict by requiring the plaintiff to write off a specified amount in order to prevent grant of a new trial. *Hayslip v. Fields*, 142 Ga. 49, 82 S.E. 441 (1914). See also *McConnell v. Selph*, 30 Ga. App. 795, 119 S.E. 438 (1923).

**Time for correction of verdict by jury.** — Jury in a justice of the peace court may correct the jury's verdict at the time of returning the verdict and before the



jurors have dispersed or been discharged when the jurors have made a mistake in writing the verdict out. *Almand v. Scott & Co.*, 83 Ga. 402, 11 S.E. 653 (1889).

**Perfecting verdict in presence of jury.** — There was no error in allowing the verdict to be perfected in the presence of the jury before the jury had retired from the box. *Manry v. First Nat'l Bank*, 195 Ga. 163, 23 S.E.2d 662 (1942).

**Correction in suit on an account.** — Trial court correctly orders that the jury verdict be corrected to amount sued for on an account if the plaintiff's own complaint and evidence shows the plaintiff is not

entitled to more on the account. *Chieffe v. Alcoa Bldg. Prods., Inc.*, 168 Ga. App. 384, 309 S.E.2d 167 (1983).

**Cited** in *Harvey v. Head*, 68 Ga. 247 (1881); *Weddington v. Huey*, 80 Ga. 651, 6 S.E. 281 (1888); *Johns v. State*, 79 Ga. App. 429, 54 S.E.2d 142 (1949); *Maxwell v. Summerville Lumber Co.*, 87 Ga. App. 405, 74 S.E.2d 111 (1953); *Denham v. Shellman Grain Elevator, Inc.*, 123 Ga. App. 569, 181 S.E.2d 894 (1971); *Turley v. Turley*, 244 Ga. 808, 262 S.E.2d 112 (1979); *Rental Equip. Group, LLC v. Maci, LLC*, 263 Ga. App. 155, 587 S.E.2d 364 (2003).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 75B Am. Jur. 2d, Trial, § 1612 et seq.

**C.J.S.** — 89 C.J.S., Trial, §§ 1064, 1065, 1166 et seq.

**ALR.** — Power of court to mold or amend verdict with respect to the parties for or against whom it was rendered, 106 ALR 418.

Conflict of laws as to administration of testamentary trusts, and proper forum for judicial proceedings relating thereto, 115 ALR 802.

Conflict of laws as regards effect of divorce, or other change in the relation of insured and beneficiary, upon rights of beneficiary under insurance policy, 125 ALR 1287.

Power of trial court or appellate court to correct former's misinterpretation of jury's verdict, 160 ALR 457.

Validity of verdict awarding medical expenses to personal injury plaintiff, but failing to award damages for pain and suffering, 55 ALR4th 186.

### 9-12-7. Amendment of verdict — After dispersal of jury.

A verdict may be amended in mere matter of form after the jury has dispersed. However, after a verdict has been received and recorded and the jury has dispersed, it may not be amended in matter of substance either by what the jurors say they intended to find or otherwise. (Orig. Code 1863, § 3422; Code 1868, § 3442; Code 1873, § 3492; Code 1882, § 3492; Civil Code 1895, § 5111; Civil Code 1910, § 5695; Code 1933, § 110-111.)

**Cross references.** — For corresponding provision relating to criminal procedure, see § 17-9-40.

**Law reviews.** — For comment on *Gibbs v. Forrester*, 204 Ga. 545, 50 S.E.2d 318 (1948), see 11 Ga. B.J. 495 (1949).

### JUDICIAL DECISIONS

**Court's duty to reshape informal jury verdict.** — Jury may express their meaning in an informal manner, and the court has the right to put it in such form and shape as to do justice to the parties, according to the pleadings and the evi-

dence. *Davis v. Wright*, 194 Ga. 1, 21 S.E.2d 88 (1942).

**Amendment to conform to reasonable intent of verdict.** — Authority given the trial judge to amend judgment to conform to the reasonable



intendment of the verdict constitutes an exception to the rule of this section. *Turley v. Turley*, 244 Ga. 808, 262 S.E.2d 112 (1979).

**Polling of jury.** — Judge may poll the jury as to the intendment of the jury's verdict. *Ballard v. Turner*, 147 Ga. App. 584, 249 S.E.2d 637 (1978).

**Adding interest after jury's denial of interest.** — It is error for the trial court to add interest after the jury has denied interest in the jury's verdict. *Hoffman v. Clendenon*, 150 Ga. App. 98, 256 S.E.2d 676 (1979).

**Trial court was without authority to add additional interest** after the jury dispersed since it was clear that the jury intended to award interest, but found that the plaintiff was entitled to less than the maximum amount the court charged could be awarded. *Voxcom, Inc. v. Boda*, 221 Ga. App. 619, 472 S.E.2d 155 (1996).

**Intention of jury.** — When intention of the jury is not apparent on the face of the verdict, the court has no power to amend the verdict. *Polk v. Fulton County*, 96 Ga. App. 733, 101 S.E.2d 736 (1957).

When the intention of the jury is apparent on the face of the verdict, the verdict's form may be amended to conform to the apparent intention. *Polk v. Fulton County*, 96 Ga. App. 733, 101 S.E.2d 736 (1957).

When the jury's intendment appears plainly from record of the proceedings in the case, the trial court does not abuse the court's discretion in fashioning the court's judgment to conform to that intendment. *Gateway Leasing Corp. v. Heath*, 168 Ga. App. 858, 310 S.E.2d 549 (1983).

**Illegal portion of a verdict** may be separated and stricken under former Code 1933, § 110-112 (see now O.C.G.A. § 9-12-8). *Hardin v. Fireman's Fund Ins. Co.*, 150 Ga. App. 277, 257 S.E.2d 300 (1979).

As the illegal portion of the jury's verdict was determinable and separable from the rest and the trial court properly wrote off the illegal portion of the verdict and reduced the principal amount of the judgment, there was no cause to grant a guarantor's request for a new trial. *Fletcher v. C. W. Matthews Contr. Co.*, 322 Ga. App. 751, 746 S.E.2d 230 (2013).

**Expressing legal meaning of jury's finding.** — When a jury, by the consent of

the parties, is allowed to disperse after making the jury's verdict, and returns into court, it was not error in the court to allow an alteration to be made, which alteration expressed the legal meaning of the finding. *Jones v. Smith*, 64 Ga. 711 (1880).

**Amending verdict after dispersing temporarily.** — After dispersal for the night, with the intention of returning the verdict found in the morning, the court properly allowed an amendment in the morning to make the verdict correspond with the statement of the foreperson. *Barnes v. Strohecker*, 17 Ga. 340 (1855).

**Ordering jury back in session to clarify difference.** — After the jury in a justice of the peace court reached a verdict while the court was recessed, and dispersed, and when the court reconvened the jury reassembled in the jury box, and the verdict was read, and when the foreperson of the jury thereupon stated that the jury had intended to find for the defendants, instead of for the plaintiff and after the justice of the peace polled the jury and ascertained that the jury intended to find for the defendants, and the justice instructed the jury as to the identity of the parties as plaintiff and defendants, the justice did not err in ordering the jury back to the jury room to make a verdict. *McGahee v. Samuels*, 61 Ga. App. 773, 7 S.E.2d 611 (1940).

**Error in using "plaintiff" instead of "defendant"** when the meaning is clear has been held to be immaterial as a mere lapsus linguae. *Polk v. Fulton County*, 96 Ga. App. 733, 101 S.E.2d 736 (1957).

**Ordering jury to find verdict contrary to the jury's intent.** — It was error for the court to instruct the jury to return a verdict for a different amount from that which the jury had informed the court before the jurors dispersed that the jurors had intended to find. *Monroe v. Alden*, 61 Ga. App. 829, 7 S.E.2d 424 (1940).

**Failure of the foreperson to sign a verdict** amounted at most to an informality which was properly amended. *Avera v. Tool, McGarrah & Toudee*, 74 Ga. 398 (1884).

**Jury foreperson may be called back to date the verdict** after the jury has been discharged. *Fowler v. Aldridge*, 108 Ga. App. 358, 133 S.E.2d 48 (1963).



**When modification of verdict in substance permitted.** — When a jury makes a mistake in writing a verdict, and the verdict as returned into court does not express or contain the true finding of the jury, the jury, before dispersing, may change or modify the jury's verdict in matter of substance so as to express the true intention and finding of the jury. *Monroe v. Alden*, 61 Ga. App. 829, 7 S.E.2d 424 (1940); *Ballard v. Turner*, 147 Ga. App. 584, 249 S.E.2d 637 (1978).

**Verdict not to be amended after received and recorded.** — Verdict may not be amended in substance after the verdict has been received and recorded, and the jury has dispersed; this is nonetheless true in a case wherein the court had directed what the verdict should be. *McGahee v. Samuels*, 61 Ga. App. 773, 7 S.E.2d 611 (1940); *Harlan v. Ellis*, 198 Ga. 678, 32 S.E.2d 389 (1944); *Morris v. Morris*, 242 Ga. 591, 250 S.E.2d 459 (1978); *Walter E. Heller & Co. v. Aetna Bus. Credit, Inc.*, 151 Ga. App. 898, 262 S.E.2d 151 (1979).

After dispersal of the jury a judge has no power to add to or take from the jury's findings, and has not the power, by amendment or reformation, to supply substantial omissions or make substantial changes in the verdict as rendered by the jury. *Fried v. Fried*, 208 Ga. 861, 69 S.E.2d 862 (1952); *Parrish Bakeries of Ga., Inc. v. Wiseman Baking Co.*, 104 Ga. App. 573, 122 S.E.2d 260 (1961); *Bass v. Barrett*, 190 Ga. App. 314, 378 S.E.2d 722 (1989).

Jury found a breach of the duty of good faith, but did not find that a broker was the procuring cause of a lease negotiated by a corporation, or that the broker was entitled to recover in quantum meruit, which left the verdict for breach of the duty of good faith that the broker had abandoned; the broker was not allowed to redraft the verdict form that it presented to include a finding on procuring cause or quantum meruit, and, thus, the corporation was entitled to judgment notwithstanding the verdict. *Quantum Trading Corp. v. Forum Realty Corp.*, 278 Ga. App. 485, 629 S.E.2d 420 (2006).

Under O.C.G.A. § 9-12-7, a verdict could be amended in mere matter of form after the jury has dispersed; however, af-

ter a verdict was received and recorded and the jury has dispersed, a verdict could not be amended in a matter of substance either by what the jurors say the jurors intended to find or otherwise. *Wilkinson v. State*, 283 Ga. App. 213, 641 S.E.2d 189 (2006).

**Even when jury has found punitive but not general damages.** — After the jury disperses, and the verdict has been received and recorded, it may not be amended in a matter of substance, even if the jury has found punitive but no general damages. *Ballard v. Turner*, 147 Ga. App. 584, 249 S.E.2d 637 (1978).

**Reassembling jury after verdict received and recorded.** — When a jury has rendered an imperfect verdict, by not finding all the issues submitted to the jury, it was held that after the verdict had been received and recorded, and the jury discharged from further consideration of the action, that the court erred, after the expiration of four days, in reassembling the jury and amending the verdict according to what the jury stated was their intention to find. *Settle v. Alison*, 8 Ga. 201, 52 Am. Dec. 393 (1850); *Read Phosphate Co. v. Wells*, 18 Ga. App. 656, 90 S.E. 358 (1916).

**Motion for new trial required.** — When the jury found for the plaintiff punitive damages and attorney's fees, but no actual damages, the trial judge erred in granting the defendants' motion to strike the jury's findings as surplusage and in entering a judgment for the defendants since a verdict may not be set aside or substantially changed except upon a motion for new trial, or its equivalent. *Parrish Bakeries of Ga., Inc. v. Wiseman Baking Co.*, 104 Ga. App. 573, 122 S.E.2d 260 (1961).

**Instructing jury to correct jury's verdict.** — If a judge is not satisfied that the verdict as returned is proper, before receiving the verdict the judge may require the jury to return to the room and correct the jury's verdict under proper instructions from the court. *Ballard v. Turner*, 147 Ga. App. 584, 249 S.E.2d 637 (1978).

**Erroneous modification of the jury verdict.** — Trial court erroneously modified the jury verdict by awarding any



overpayment of marital debt to the wife. In ordering that \$19,861 of the house sale proceeds be paid toward non-existent debts and that the resulting overpayment then be returned to the wife, the trial court completely undermined the jury verdict by giving the wife a windfall of approximately \$19,000 that the jury did not intend while denying the mother-in-law the proceeds from the house sale awarded to her in the verdict. *Blevins v. Brown*, 267 Ga. App. 665, 600 S.E.2d 739 (2004).

**Decree substantially modifying verdict.** — Judge cannot accomplish the same result as amending a verdict in manner of substance by entering a decree different from the verdict of the jury, thereby eliminating certain substantial findings of the verdict, and substantially modifying or changing other findings of the jury. *Fried v. Fried*, 208 Ga. 861, 69 S.E.2d 862 (1952); *Parrish Bakeries of Ga., Inc. v. Wiseman Baking Co.*, 104 Ga. App. 573, 122 S.E.2d 260 (1961).

**Substitution for verdict which was contrary to instructions.** — When the verdict is palpably contrary to the instructions, the judge has no power to discard the verdict and substitute another in the verdict's place. *McCrory v. Gano*, 115 Ga. 295, 41 S.E. 580 (1902).

**Amending directed verdict.** — After the court has directed a verdict, the court should not amend the returned verdict at the instance of the party whose attorney prepared the verdict. *McCrory v. Gano*, 115 Ga. 295, 41 S.E. 580 (1902).

**Requiring affidavits of jurors as to findings of fact.** — At a hearing of the defendant's motions for new trial, a court errs in allowing and considering affidavits of jurors as to what findings the jurors had made in reaching the jurors' verdicts since the effect of such affidavits is to amend the verdict into special findings of fact, and special verdicts are only permissible in equity cases. *Davison-Paxon Co. v. Archer*, 91 Ga. App. 131, 85 S.E.2d 182 (1954).

**Statement of single juror as to jury's intent.** — It is improper to amend the judgment on the basis of what one of the jurors says the jury intended. *Turley v. Turley*, 244 Ga. 808, 262 S.E.2d 112 (1979).

**Personal property award added to the jury's verdict by a court in the**

court's final judgment is improper, because a trial court is not authorized to award any additional property after the jury's verdict. *Garner v. Garner*, 242 Ga. 446, 249 S.E.2d 200 (1978).

**Creating trust to effectuate jury's intent.** — When, in a divorce case, the jury clearly intended to create a trust for the purpose of providing support for a minor child during the minor's minority and the jury also intended that there be monthly payments from the trust for the use of the child, but the husband failed to take any substantive steps to set up the trust, there was no error in the trial court naming a trustee and providing the necessary provisions to effectuate the trust for the purpose of providing monthly child support, such as requiring the husband to make the payments necessary to keep current on his obligations for his share of the debts, encumbrances, and maintenance of the trust property. *Aycock v. Aycock*, 251 Ga. 104, 303 S.E.2d 456 (1983).

**Damage award could not be amended.** — When the trial judge attempted to amend the jury's verdict, after the jury had dispersed, regarding a matter of substance, the award of damages, this action exceeded the authority vested by law in the trial judge to "mold" the verdict and, thus, could not be sustained. *Force v. McGeachy*, 186 Ga. App. 781, 368 S.E.2d 777 (1988).

After the insured's home was severely damaged by fire, and the insured was awarded a jury verdict against the insurer for the insured's loss, the trial court erred in increasing the amount of damages for the loss of the plaintiff's home, but did not err in refusing to modify the jury's set-off for mortgage payments made by the insurer as this would have been an unauthorized "molding" of the jury's verdict. *Allstate Ins. Co. v. Durham*, 194 Ga. App. 867, 392 S.E.2d 53 (1990).

Trial court did not err by refusing to enter a judgment molding with a jury's verdict to correct an alleged illegality and inconsistency in the damages award because under O.C.G.A. § 9-12-7 the trial court had no authority to mold the verdict since an increase in damages was a matter of substance, not mere form; a plumb-



ing contractor was not without a potential remedy if the contractor believed that the jury's verdict was incorrect because, after the return of the verdict but before the dispersal of the jury, the plumbing contractor could have argued that the jury's damage award was illegal and internally inconsistent and could have requested the trial court to give additional instructions and permit the jury to consider the matter again, and alternatively, after the jury was dispersed, the plumbing contractor could have asked for a new trial on the issue of damages or to conditionally grant a new trial under the court's power of additur under O.C.G.A. § 51-12-12. *Gill Plumbing Co. v. Jimenez*, 310 Ga. App. 863, 714 S.E.2d 342 (2011), cert. denied, No. S11C1826, 2011 Ga. LEXIS 966 (Ga. 2011).

**Trial court's award of a substantial sum in litigation expenses** to the wife in a divorce proceeding worked a change "in matter of substance" of the jury's allocation of resources between the parties, when such allocation was based upon the jury's expectation that no party would be required to pay litigation costs incurred by the other party. *Stone v. Stone*, 258 Ga. 716, 373 S.E.2d 627 (1988).

**Equitable division of marital residence.** — In a divorce action, the trial court erred in granting a new trial on a sole issue of equitable division of the marital residence. If a motion for a new trial is granted, all issues of the allocation of economic resources must be determined de novo. *Griggs v. Griggs*, 260 Ga. 249, 392 S.E.2d 11 (1990).

**Trial court could not amend judgment to eliminate party's interest.** — In a breach of contract case arising out of an LLC operating agreement, it was not clear that the jury intended to extinguish a former LLC member's interest in the

operating agreement by the jury's verdict awarding the former member damages, and under O.C.G.A. §§ 9-12-7, 9-12-9, and 9-12-14, the trial court could not vary the judgment from the terms of the verdict. *Kaufman Development Partners, L.P. v. Eichenblatt*, 324 Ga. App. 71, 749 S.E.2d 374 (2013).

**Cited in** *Corbett v. Gilbert*, 24 Ga. 454 (1858); *Mullins v. Christopher*, 36 Ga. 584 (1867); *Patterson v. Murphy*, 63 Ga. 281 (1879); *Shelton v. O'Brien*, 76 Ga. 820 (1886); *Brooke v. Lowry Nat'l Bank*, 141 Ga. 493, 81 S.E. 223 (1914); *Nicholson v. Smith & Son*, 29 Ga. App. 376, 115 S.E. 499 (1923); *United States v. 340 Acres of Land*, 54 F. Supp. 457 (S.D. Ga. 1944); *Gibbs v. Forrester*, 204 Ga. 545, 50 S.E.2d 318 (1948); *Reagan v. Reagan*, 220 Ga. 587, 140 S.E.2d 841 (1965); *Moon v. Moon*, 222 Ga. 650, 151 S.E.2d 714 (1966); *Saint v. Ryan*, 114 Ga. App. 489, 151 S.E.2d 826 (1966); *Thompson v. Ingram*, 226 Ga. 668, 177 S.E.2d 61 (1970); *Bradley v. Bradley*, 233 Ga. 83, 210 S.E.2d 1 (1974); *Wadlington v. Wadlington*, 235 Ga. 582, 221 S.E.2d 1 (1975); *Roswell Road-Perimeter Hwy. Liquor Store, Inc. v. Schurke*, 137 Ga. App. 145, 222 S.E.2d 847 (1975); *Ace Parts & Distribs., Inc. v. First Nat'l Bank*, 146 Ga. App. 4, 245 S.E.2d 314 (1978); *Miller v. Roses' Stores, Inc.*, 151 Ga. App. 158, 259 S.E.2d 162 (1979); *Cotts v. Cotts*, 245 Ga. 138, 263 S.E.2d 163 (1980); *Todhunter v. Price*, 248 Ga. 411, 283 S.E.2d 864 (1981); *Taylor v. Smith*, 159 Ga. App. 797, 285 S.E.2d 200 (1981); *First Union Nat'l Bank v. Gorlin*, 194 Ga. App. 574, 390 S.E.2d 923 (1990); *French Quarter, Inc. v. Peterson, Young, Self & Asselin*, 220 Ga. App. 852, 471 S.E.2d 9 (1996); *Rental Equip. Group, LLC v. Maci, LLC*, 263 Ga. App. 155, 587 S.E.2d 364 (2003); *Surles v. Cornell Corr. of Cal., Inc.*, 290 Ga. App. 260, 659 S.E.2d 683 (2008).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 75B Am. Jur. 2d, Trial, § 1612 et seq.

**C.J.S.** — 89 C.J.S., Trial, §§ 1074 et seq., 1166 et seq.

**ALR.** — Power of court to mold or amend verdict with respect to the parties

for or against whom it was rendered, 106 ALR 418.

Entry of final judgment after disagreement of jury, 31 ALR2d 885.

Court's power to increase amount of verdict or judgment over either party's



refusal or failure to consent to addition, 56 ALR2d 213.

Competency of juror's statement or affidavit to show that verdict in a civil case was not correctly recorded, 18 ALR3d 1132.

Propriety of reassembling jury to amend, correct, clarify, or otherwise

change verdict after jury has been discharged, or has reached or sealed its verdict and separated, 14 ALR5th 89.

Propriety of reassembling jury to amend, correct, clarify, or otherwise change verdict after discharge or separation at conclusion of civil case, 19 ALR5th 622.

### 9-12-8. Amendment of verdict — When part illegal.

If a part of a verdict is legal and a part illegal, the court will construe the verdict and order it amended by entering a remittitur as to that part which is illegal and giving judgment for the balance. (Orig. Code 1863, § 3423; Code 1868, § 3443; Code 1873, § 3493; Code 1882, § 3493; Civil Code 1895, § 5112; Civil Code 1910, § 5696; Code 1933, § 110-112.)

## JUDICIAL DECISIONS

**Purpose of this section** is to authorize the amendment of a partially illegal verdict so as to enter a valid final judgment, thereby obviating the necessity of a new trial. *Roswell Road-Perimeter Hwy. Liquor Store, Inc. v. Schurke*, 138 Ga. App. 502, 227 S.E.2d 282 (1976).

**Whole judgment will not be set aside because of error**, if it can be determined from the record how much is erroneous. *George A. Rheman Co. v. May*, 71 Ga. App. 651, 31 S.E.2d 738 (1944).

**Verdict must conform to the pleadings** and must not be inconsistent. *Miller v. Ray*, 84 Ga. App. 251, 65 S.E.2d 923 (1951).

**Matters not raised by pleadings disregarded as surplusage.** — When part of a verdict was a gratuitous finding, but was not in conflict with the first part of the verdict which was a finding in favor of the defendant, that part of the verdict upon the only issue that could have been submitted to the jury was good and enforceable, and the remaining part of the verdict, dealing with matters not involving any issue raised by the pleadings, was beyond the legitimate province of the jury, and would be disregarded as surplusage. *Patterson v. Fountain*, 188 Ga. 473, 4 S.E.2d 38 (1939).

**Illegal portion of a divorce decree** can be separated and properly stricken.

*Kimble v. Kimble*, 240 Ga. 100, 239 S.E.2d 676 (1977); *Hardin v. Fireman's Fund Ins. Co.*, 150 Ga. App. 277, 257 S.E.2d 300 (1979).

**Separation of illegal portions of judgment.** — When the illegal provisions of a judgment can be separated from those which are legal, those parts which are illegal may be set aside and the legal provisions allowed to stand. *Davis v. Davis*, 206 Ga. 559, 57 S.E.2d 673 (1950).

As the illegal portion of the jury's verdict was determinable and separable from the rest and the trial court properly wrote off the illegal portion of the verdict and reduced the principal amount of the judgment, there was no cause to grant a grantor's request for a new trial. *Fletcher v. C. W. Matthews Contr. Co.*, 322 Ga. App. 751, 746 S.E.2d 230 (2013).

**Alimony decree granting insurance proceeds to children** who are not beneficiaries, upon death of their father, is illegal and properly stricken under the provisions of this section as it would amount to a further grant of child support from the estate of the wife. *Veal v. Veal*, 226 Ga. 285, 174 S.E.2d 435 (1970).

**Verdict for an amount in excess of an insurance policy** was not valid against an insurance carrier as to the excess, but was not invalid by reason of the amount as to the insured, and it



cannot be wholly set aside because it was partly legal and partly illegal. It may be treated as an irregularity as to the complaining insurance carrier; and an irregularity in the judgment, apparent on the face of the record may often be corrected. *George A. Rheman Co. v. May*, 71 Ga. App. 651, 31 S.E.2d 738 (1944).

**Vague portion stricken.** — Portion of the verdict stating the defendant “shall pay total cost of operation and hospitalization of plaintiff” was too vague and indefinite to authorize a decree as to these items; the pleadings being equally indefinite in reference to operation and hospitalization, the court erred in overruling the motion to arrest the judgment so far as the judgment applied to these subjects. *Martin v. Martin*, 183 Ga. 787, 189 S.E. 843 (1937).

**Illegal award of punitive damages properly struck.** — Because an assignee was not legally entitled to punitive damages, the illegal portion of a jury’s verdict was separable from the legal portion; consequently, the trial court acted within the authority of O.C.G.A. § 9-12-8 by striking the jury’s illegal award of punitive damages and entering judgment on the remaining legal part. *Chapman v. Clark*, 272 Ga. App. 667, 613 S.E.2d 184 (2005).

**Illegal award of attorney’s fees and expenses.** — Ancillary award of attorney fees and expenses in favor of a seller was ordered struck, pursuant to O.C.G.A. § 9-12-8, as: (1) the jury failed to find the buyers liable on the seller’s underlying substantive claims; (2) the award was based on O.C.G.A. § 13-6-11, not O.C.G.A. § 10-5-14; and, as a result, (3) the lack of a damages award in favor of the seller did not support the award. *Davis v. Johnson*, 280 Ga. App. 318, 634 S.E.2d 108 (2006).

**When an inconsistent and void verdict is returned** by the jury, it is proper

for the judge to refuse to receive the verdict, and to require the jury to return for further deliberations. *Thompson v. Ingram*, 226 Ga. 668, 177 S.E.2d 61 (1970); *Kemp v. Bell-View, Inc.*, 179 Ga. App. 577, 346 S.E.2d 923 (1986); *Kendall v. Curtis*, 194 Ga. App. 37, 389 S.E.2d 550 (1989).

**Verdict that is contradictory and repugnant** is void, and no valid judgment can be entered thereon. A judgment entered on such a verdict will be set aside. *Thompson v. Ingram*, 226 Ga. 668, 177 S.E.2d 61 (1970); *Kendall v. Curtis*, 194 Ga. App. 37, 389 S.E.2d 550 (1989).

**Cited in** *Steed v. Cruise*, 70 Ga. 168 (1883); *Haley v. Covington*, 19 Ga. App. 782, 92 S.E. 297 (1917); *Cowart v. McLarin*, 87 Ga. App. 253, 73 S.E.2d 507 (1952); *Maxwell v. Summerville Lumber Co.*, 87 Ga. App. 405, 74 S.E.2d 111 (1953); *Church of God of Union Ass’y, Inc. v. City of Dalton*, 216 Ga. 659, 119 S.E.2d 11 (1961); *Barnes v. Barnes*, 230 Ga. 226, 196 S.E.2d 390 (1973); *Elrod v. Elrod*, 231 Ga. 222, 200 S.E.2d 885 (1973); *Scales v. Scales*, 235 Ga. 509, 220 S.E.2d 267 (1975); *Wadlington v. Wadlington*, 235 Ga. 582, 221 S.E.2d 1 (1975); *Eco-Rez, Inc. v. Citizens Bank*, 141 Ga. App. 90, 232 S.E.2d 587 (1977); *McGarr v. McGarr*, 239 Ga. 640, 238 S.E.2d 427 (1977); *Coleman v. Coleman*, 240 Ga. 417, 240 S.E.2d 870 (1977); *Bagwell v. Sportsman Camping Ctrs. of Am., Inc.*, 144 Ga. App. 486, 241 S.E.2d 602 (1978); *Morris v. Morris*, 242 Ga. 591, 250 S.E.2d 459 (1978); *Plaza Pontiac, Inc. v. Shaw*, 158 Ga. App. 799, 282 S.E.2d 383 (1981); *Georgia Farm Bureau Mut. Ins. Co. v. Collins*, 161 Ga. App. 149, 288 S.E.2d 106 (1982); *Biggers v. Biggers*, 250 Ga. 248, 297 S.E.2d 257 (1982); *Cleaveland v. Alford*, 188 Ga. App. 690, 373 S.E.2d 853 (1988).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 75B Am. Jur. 2d, Trial, § 1612 et seq.

**C.J.S.** — 89 C.J.S., Trial, §§ 1074 et seq., 1166 et seq.

**ALR.** — Power of court to mold or amend verdict with respect to the parties

for or against whom it was rendered, 106 ALR 418.

Power of appellate court to remit portion of verdict or judgment covering period barred by statute of limitations, 26 ALR2d 956.



Verdict in excess of amount demanded as requiring new trial notwithstanding voluntary remittitur, 65 ALR2d 1331.

### 9-12-9. Judgment to conform to verdict.

Judgment and execution shall conform to the verdict. (Orig. Code 1863, § 3482; Code 1868, § 3504; Code 1873, § 3562; Code 1882, § 3562; Civil Code 1895, § 5333; Civil Code 1910, § 5928; Code 1933, § 110-301.)

**Law reviews.** — For article comparing sections of the Georgia Civil Practice Act (Ch. 11, of this title) with preexisting

provisions of the Georgia Code, see 3 Ga. St. B.J. 295 (1967).

## JUDICIAL DECISIONS

**Amendment of judgment to conform to verdict.** — Judgment must conform to reasonable intendment of verdict upon which the judgment is based and the judgment may be amended by order of the court in order to conform to the verdict, even after execution has been issued. *Frank E. Wood Co. v. Colson*, 43 Ga. App. 265, 158 S.E. 533 (1931).

Judgment entered on jury verdict in favor of the homeowners had to require the repair of the dam at issue so that it impounded a lake with the normal pool elevation that the evidence reflected was the elevation prior to an emergency partial breach of the dam as the issue for resolution was the action to be taken by the dam owners to comply with an order of the Environmental Protection Division of the Georgia Natural Resources Department without diminishing the homeowners' property interest in the homeowners' irrevocable easement. *Forsyth County v. Martin*, 279 Ga. 215, 610 S.E.2d 512 (2005).

**Judgment must follow true meaning and intent** of finding of the jury. *Taylor v. Taylor*, 212 Ga. 637, 94 S.E.2d 744 (1956); *King v. Cox*, 130 Ga. App. 91, 202 S.E.2d 216 (1973); *DOT v. Great S. Enters., Inc.*, 137 Ga. App. 710, 225 S.E.2d 80 (1976).

Trial court erred by entering judgment on the jury's first verdict in a property owner's action for trespass and nuisance because the trial court had the authority

and duty to instruct the jury to reconsider the verdict once a substantial error in the charge was discovered even though the owner had not objected to the trial court's actions, and the charges and the verdict form created substantial uncertainty about the meaning of the jury's initial decision; the initial failure to charge on O.C.G.A. § 51-12-33(g) was harmful because the jury's initial decision showed an intent to reduce the owner's award by only 50 percent, not 100 percent, but once the jury was fully instructed, the jury confirmed that intent in the second verdict, and the trial court was required to enter judgment in accordance with that intent. *Bailey v. Annistown Rd. Baptist Church, Inc.*, 301 Ga. App. 677, 689 S.E.2d 62 (2009), cert. denied, No. S10C0669, 2010 Ga. LEXIS 468 (Ga. 2010).

**Decree should follow special verdict** so far as facts are found on the issues presented, and the decree should be based thereon in connection with the facts admitted in the pleadings. *Law v. Coleman*, 173 Ga. 68, 159 S.E. 679 (1931).

**Relationship of decree to jury's finding of facts.** — It is not true that no decree can be rendered unless the verdict contains finding of all facts upon which the verdict can be based; judge in rendering a decree can grant no relief contrary to the findings of fact made by the jury. *Law v. Coleman*, 173 Ga. 68, 159 S.E. 679 (1931).

**In determining whether a judgment conforms to the verdict,** judg-



ment must be construed with reference to pleadings and the evidence. *Taylor v. Taylor*, 212 Ga. 637, 94 S.E.2d 744 (1956); *DOT v. Great S. Enters., Inc.*, 137 Ga. App. 710, 225 S.E.2d 80 (1976).

**When verdict conformed to pleadings** and was authorized thereby, it would have been improper to have sustained the defendants' motion for an order making the judgment in the case conform to the verdict rendered by the jury. *Maxwell v. Summerville Lumber Co.*, 87 Ga. App. 405, 74 S.E.2d 111 (1953).

**Amendment after verdict received and recorded.** — Verdict may not be amended in matters of substance after the verdict has been received and recorded, and the jury has dispersed; this is nonetheless true in a case wherein the court had directed what the verdict should be. *Walter E. Heller & Co. v. Aetna Bus. Credit, Inc.*, 151 Ga. App. 898, 262 S.E.2d 151 (1979).

Verdict against a bank branch which was in fact a corporate nonentity could not be amended by the trial court to substitute the main bank as the party against whom the verdict was to be considered rendered. *Harrell v. Bank of S.*, 174 Ga. App. 384, 330 S.E.2d 147 (1985).

**Setting aside jury's verdict.** — Judgment based on jury's verdict cannot be set aside by a motion to set aside as long as the verdict upon which the judgment is based stands and has not been set aside by proper procedure. *Adams v. Morgan*, 114 Ga. App. 180, 150 S.E.2d 556, cert. dismissed, 222 Ga. 820, 152 S.E.2d 693 (1966).

**Verdict that is contradictory and repugnant is void**, and no valid judgment can be entered thereon. *Four Oaks Homes, Inc. v. Smith*, 153 Ga. App. 326, 265 S.E.2d 76 (1980).

**Verdicts must have a liberal construction**, and should be so construed as to stand, if practicable; and the judge may examine the entire pleadings, the admissions in the answer, and all undisputed facts in making a final decree. *Law v. Coleman*, 173 Ga. 68, 159 S.E. 679 (1931).

**Only a single judgment could be entered from verdict.** — Although there was no procedure under Georgia law by which two separate judgments could be

rendered from a single verdict, a bankruptcy court could limit automatic stay relief in a manner that would prevent the creditors from collecting any portion of a verdict in a state court civil action arising from an automobile accident that was in excess of the debtor's policy limits. Creditors could then file a renewed motion for stay relief to the extent that the creditors sought to pursue, or encourage the debtor to pursue, a bad faith claim against the debtor's insurer for failure to settle the case within the debtor's policy limits. *Bruch v. Hall (In re Hall)*, No. 14-40332-EJC, 2014 Bankr. LEXIS 3550 (Bankr. S.D. Ga. Aug. 19, 2014).

**Parol proof** cannot furnish a ground of amendment of judgment. *Frank E. Wood Co. v. Colson*, 43 Ga. App. 265, 158 S.E. 533 (1931).

**Judge is not empowered to completely change verdict** by allowing interest to a damage award which the jury has denied in the jury's verdict. *Taylor v. Taylor*, 212 Ga. 637, 94 S.E.2d 744 (1956); *Giant Peanut Co. v. Carolina Chem., Inc.*, 133 Ga. App. 229, 211 S.E.2d 155 (1974), later appeal, 135 Ga. App. 597, 218 S.E.2d 305 (1975).

**Trial court could not amend judgment to eliminate party's interest.** — In a breach of contract case arising out of an LLC operating agreement, it was not clear that the jury intended to extinguish a former LLC member's interest in the operating agreement by the jury's verdict awarding the former member damages, and under O.C.G.A. §§ 9-12-7, 9-12-9, and 9-12-14, the trial court could not vary the judgment from the terms of the verdict. *Kaufman Development Partners, L.P. v. Eichenblatt*, 324 Ga. App. 71, 749 S.E.2d 374 (2013).

**When announcement by the jury is an inquiry**, and not a pronouncement, the law allows the jury all reasonable opportunity, before verdict is put on record and the jurors are discharged, to discover and declare the truth according to the judgment. *Firestone Tire & Rubber Co. v. Pinyan*, 155 Ga. App. 343, 270 S.E.2d 883 (1980).

Since the jury was confused as to whether the jurors had the power to apportion damages between two defendants,



and after the jurors returned to the courtroom when the jurors intimated the jurors had found against both defendants, specifying no amounts, but that the jurors wanted to apportion damages, the judge instructed as to this issue and the jury foreperson indicated that the jury would discuss the matter further, after which the jury then left for further deliberations and returned the verdict finding only against one defendant, there was no error in entering a judgment on this verdict as it was the only "verdict" in the case. *Firestone Tire & Rubber Co. v. Pinyan*, 155 Ga. App. 343, 270 S.E.2d 883 (1980).

**Addition of interest to judgment to conform verdict.** — Trial judge was without authority to add interest to a judgment without a direction to do so in the verdict; since the trial court's judgment was not an accurate reflection of the jury verdict, it was proper for the court to amend the judgment to conform to the verdict. *Dismuke v. Gibson*, 174 Ga. App. 546, 330 S.E.2d 771 (1985).

**Error in adding interest and fees to judgment.** — Prejudgment interest and attorney's fees were stricken, although the parties stipulated at the unreported charge conference that issues of attorney's fees and prejudgment interest would be withdrawn from the jury's consideration and instead would be added to the verdict by the court in the event of an award in favor of the plaintiff since the court ruled that it was error to add prejudgment interest and attorney's fees because O.C.G.A. § 9-12-9 requires that judgment and execution shall conform to the verdict. *Dover v. Master Lease Corp.*, 203 Ga. App. 526, 417 S.E.2d 368 (1992).

**Erroneous modification of the jury verdict.** — Trial court erroneously modified the jury verdict by awarding any

overpayment of marital debt to the wife. In ordering that \$19,861 of the house sale proceeds be paid toward non-existent debts and that the resulting overpayment then be returned to the wife, the trial court completely undermined the jury verdict by giving the wife a windfall of approximately \$19,000 that the jury did not intend, while denying the mother-in-law the proceeds from the house sale awarded to her in the verdict. *Blevins v. Brown*, 267 Ga. App. 665, 600 S.E.2d 739 (2004).

**Cited in** *Banks v. Kilday*, 88 Ga. App. 307, 76 S.E.2d 642 (1958); *Hesters v. Sammons*, 106 Ga. App. 126, 126 S.E.2d 484 (1962); *Jenkins v. Tastee-Freez of Ga., Inc.*, 114 Ga. App. 849, 152 S.E.2d 909 (1966); *Willingham v. Lee*, 124 Ga. App. 641, 185 S.E.2d 553 (1971); *Norton Realty & Loan Co. v. Board of Educ.*, 129 Ga. App. 668, 200 S.E.2d 461 (1973); *Jackson v. Riviera Dev. Corp.*, 130 Ga. App. 146, 202 S.E.2d 545 (1973); *Kamor v. Firemen's Fund Ins. Co.*, 133 Ga. App. 234, 211 S.E.2d 179 (1974); *Jolly v. Jolly*, 137 Ga. App. 625, 224 S.E.2d 807 (1976); *Erdmier v. Eunice*, 143 Ga. App. 505, 239 S.E.2d 192 (1977); *Lowe v. Lowe*, 243 Ga. 398, 254 S.E.2d 323 (1979); *First Am. Bank v. Bishop*, 244 Ga. 317, 260 S.E.2d 49 (1979); *Turley v. Turley*, 244 Ga. 808, 262 S.E.2d 112 (1979); *C & W Land Dev. Corp. v. Kaminsky*, 175 Ga. App. 774, 334 S.E.2d 362 (1985); *Force v. McGeachy*, 186 Ga. App. 781, 368 S.E.2d 777 (1988); *Chastain v. United States Fid. & Guar. Co.*, 190 Ga. App. 215, 378 S.E.2d 397 (1989); *First Union Nat'l Bank v. Gorlin*, 194 Ga. App. 574, 390 S.E.2d 923 (1990); *Meyers v. Thornton*, 224 Ga. App. 326, 480 S.E.2d 334 (1997); *Pinkerton & Laws, Inc. v. Macro Constr., Inc.*, 226 Ga. App. 169, 485 S.E.2d 797 (1997); *Holmes v. Henderson*, 274 Ga. 8, 549 S.E.2d 81 (2001).

## RESEARCH REFERENCES

**C.J.S.** — 49 C.J.S., Judgments, §§ 77, 78.

**ALR.** — Judgments enforcing contract contrary to public policy as subject to collateral attack, 30 ALR 1100.

Right of one liable for death or injury to have damages awarded in judgment against him paid over to physician or

nurse for medical attention given to injured or deceased person, 66 ALR 711.

Power of court to add interest to verdict returned by jury, 72 ALR 1150.

Right to have jury polled regarding method of reaching verdict, 86 ALR 203.

Absence of accused at return of verdict in felony case, 23 ALR2d 456.



### 9-12-10. Judgment for principal and interest.

In all cases where judgment is obtained, the judgment shall be entered for the principal sum due, with interest, provided the claim upon which it was obtained draws interest. No part of the judgment shall bear interest except the principal which is due on the original debt. (Laws 1814, Cobb's 1851 Digest, p. 393; Code 1863, § 3489; Code 1868, § 3512; Code 1873, § 3570; Code 1882, § 3570; Civil Code 1895, § 5341; Civil Code 1910, § 5936; Code 1933, § 110-304.)

**Cross references.** — Allowable rates of interest on judgments, § 7-4-12.

### JUDICIAL DECISIONS

**Post-judgment interest.** — O.C.G.A. § 9-12-10 forbids post-judgment interest except on the principal or original debt. *DOT v. Consolidated Equities Corp.*, 181 Ga. App. 672, 353 S.E.2d 603 (1987).

**Post-judgment interest under O.C.G.A. § 13-6-11.** — Trial court properly excluded an award of pre-judgment interest in calculating the amount of post-judgment interest and properly applied post-judgment interest to the award of attorney fees under O.C.G.A. § 13-6-11. *Davis v. Whitford Props.*, 282 Ga. App. 143, 637 S.E.2d 849 (2006).

**Use of prejudgment interest to compute post judgment interest.** — O.C.G.A. § 9-12-10 expressly excludes prejudgment interest, when authorized, to be included in the amount used to compute post judgment interest. *DOT v. Consolidated Equities Corp.*, 181 Ga. App. 672, 353 S.E.2d 603 (1987); *Groover v. Commercial Bancorp.*, 220 Ga. App. 13, 467 S.E.2d 355 (1996).

Judgment creditor was not entitled in a garnishment proceeding to collect interest on prejudgment interest. *Lott v. Arrington & Hollowell, P.C.*, 258 Ga. App. 51, 572 S.E.2d 664 (2002).

**Interest on open account** should not be included in verdict unless it is specified as such. *Linder v. Renfro*, 1 Ga. App. 58, 57 S.E. 975 (1907).

**Failure to show dates in pleading.** — In a suit for a stated sum "besides interest" on an open account when judgment was rendered for the principal amount claimed, besides a stated sum as

interest, failure to include in the petition or exhibit the dates or other data upon which interest might be computed was an amendable defect, and did not render judgment unauthorized by pleadings or subject to motion in arrest of judgment. *Holmes v. Reville*, 27 Ga. App. 552, 109 S.E. 417 (1921).

**Mistake in one's favor making interest too small** is not a good ground of exception by defendant. *Gunn v. Tackett*, 67 Ga. 725 (1881).

**Amount of principal and interest not specified.** — When, in the foreclosure of a mortgage on personalty, principal and interest were not separated, foreclosure was fatally defective. *Harris v. Usry*, 77 Ga. 426 (1886).

When the verdict in favor of the plaintiff includes both principal and interest, and does not specify the amount of each, a new trial will be required unless the plaintiff will renounce all future interest upon the judgment. *Hubbard v. McRae*, 95 Ga. 705, 22 S.E. 714 (1895); *Bentley v. Phillips*, 171 Ga. 866, 156 S.E. 898 (1930).

When a judgment permitted the plaintiffs to recover "the sum of" principal, prejudgment interest, as well as costs, with interest accruing on the sum total, it clearly provided for interest on interest and was subject to amendment to provide that interest after judgment should accrue on the principal sum only. *Windermere v. Bettes*, 211 Ga. App. 177, 438 S.E.2d 406 (1993).

**Interest on principal sum only.** — Judgment may be legally entered for prin-



principal sum and interest due on the claim sued on to date of judgment; however, such judgment only bears interest from the judgment's date on the principal sum, and interest found to be due at date of judgment does not bear interest. *Southern Loan Co. v. McDaniel*, 50 Ga. App. 285, 177 S.E. 834 (1934).

Only that portion of judgment which represents principal due on the original debt is entitled to bear interest. *Bank of Tupelo v. Collier*, 191 Ga. 852, 14 S.E.2d 59 (1941).

Judgment providing for interest on interest is erroneous. *State Hwy. Dep't v. Godfrey*, 118 Ga. App. 560, 164 S.E.2d 340 (1968); *Southern Gen. Ins. Co. v. Ross*, 227 Ga. App. 191, 489 S.E.2d 53 (1997).

**Correction after term when judgment rendered.** — Even after term when judgment or decree is rendered, irregularity may be so corrected by amendment that only the principal sum will bear interest, if by an inspection of the record, including the pleadings and verdict, or the approved findings of a master or commissioner, and without extraneous proof, the respective amounts of principal and interest can be correctly segregated. *Bank of Tupelo v. Collier*, 192 Ga. 409, 15 S.E.2d 499 (1941).

**After-accruing interest.** — Judgment as to after-accruing interest is limited to the principal sum found. *Ivester v. Brown*, 157 Ga. 376, 121 S.E. 241 (1924).

**Amendment on motion in writ of fieri facias.** — When principal and interest were segregated in accordance with the approved findings of the commissioner, the court did not err, on motion of plaintiff in writ of fieri facias, in amending the original decree rendered in an equitable partition proceeding. *Bank of Tupelo v. Collier*, 192 Ga. 409, 15 S.E.2d 499 (1941).

**Effect of final judgment rendered for less than assessors' award.** — When, in a condemnation proceeding under the "three assessor" law as contained in former Code 1933, § 36-601 et seq. (see now O.C.G.A. § 22-2-80 et seq.), the amount of the final judgment was less than the award made by the assessors, the condemnee was not liable for the payment of interest on the difference in the amount of the award and the judgment except

from the date of the judgment. *City of Atlanta v. Lunsford*, 105 Ga. App. 247, 124 S.E.2d 493 (1962).

**Judgments by confession.** — This section includes judgments obtained by confession. *Williams v. Atwood*, 52 Ga. 585 (1874).

**Condemnation proceedings.** — Pre-judgment interest is not to be included as a portion of "just and adequate compensation" in a condemnation case. *DOT v. Consolidated Equities Corp.*, 181 Ga. App. 672, 353 S.E.2d 603 (1987).

**Foreign judgment cannot be collaterally attacked** as in violation of O.C.G.A. § 9-12-10 since such an attack involves the merits of the award rather than a jurisdictional or fraud issue. *Osborne v. Bank of Delight*, 173 Ga. App. 322, 326 S.E.2d 523 (1985).

**Interest properly awarded.** — When an attorney sued a former client's ex-spouse to enforce a lien on the former client's former marital residence, which was titled in the ex-spouse's name, the trial court's award of post-judgment interest did not violate O.C.G.A. § 9-12-10, allowing an award of interest on a principal sum only, even though the judgment on which the lien was based included an award of interest, because the interest awarded by the trial court was based on the ex-spouse's breach of a duty, under the separation agreement, to pay the attorney's lien. *Northen v. Tobin*, 262 Ga. App. 339, 585 S.E.2d 681 (2003).

**Cited in** *Sharpe v. City of Waycross*, 185 Ga. 208, 194 S.E. 522 (1937); *United States v. A Certain Tract or Parcel of Land*, 47 F. Supp. 30 (S.D. Ga. 1942); *Fried v. Morris & Eckels Co.*, 118 Ga. App. 595, 164 S.E.2d 732 (1968); *Newby v. Maxwell*, 121 Ga. App. 18, 172 S.E.2d 458 (1970); *Dampier v. Citizens & S. Nat'l Bank*, 129 Ga. App. 240, 199 S.E.2d 330 (1973); *Sirmans v. Citizens & S. Nat'l Bank*, 129 Ga. App. 551, 199 S.E.2d 894 (1973); *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F. Supp. 1063 (N.D. Ga. 1980); *Stinson v. Georgia Dep't of Human Resources Credit Union*, 171 Ga. App. 303, 319 S.E.2d 508 (1984); *Dixieland Truck Brokers, Inc. v. International Indem. Co.*, 210 Ga. App. 160, 435 S.E.2d 520 (1993); *Biggs v. Heriot*, 249 Ga.



App. 461, 549 S.E.2d 131 (2001); *Threatt v. Forsyth County*, 262 Ga. App. 186, 585 S.E.2d 159 (2003).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 44B Am. Jur. 2d, Interest and Usury, § 38 et seq.

**C.J.S.** — 47 C.J.S., Interest and Usury; Consumer Credit, § 60 et seq.

**ALR.** — Power of court to add interest to verdict returned by jury, 72 ALR 1150.

Statute of limitation applicable to interest on judgment, 120 ALR 719.

Date of verdict or date of entry of judgment thereon as beginning of interest period on judgment, 1 ALR2d 479.

Recovery of interest on claim against a governmental unit in absence of provision in contract or express statutory provision, 24 ALR2d 928.

Right to interest on unpaid alimony, 33 ALR2d 1455.

Interest on decree or judgment of probate court allowing a claim against estate or making an allowance for services, 54 ALR2d 814.

Liability insurer's liability for interest and costs on excess of judgment over policy limit, 76 ALR2d 983.

Date from which interest on judgment starts running, as affected by modification of amount of judgment on appeal, 4 ALR3d 1221.

Right to interest, pending appeal, of judgment creditor appealing unsuccessfully on ground of inadequacy, 15 ALR3d 411; 11 ALR4th 1099.

Running of interest on judgment where both parties appeal, 11 ALR4th 1099.

Retrospective application and effect of state statute or rule allowing interest or changing rate of interest on judgments or verdicts, 41 ALR4th 694.

Prejudgment interest awards in divorce cases, 62 ALR4th 156.

Liability of insurer for prejudgment interest in excess of policy limits for covered loss, 23 ALR5th 75.

Date on which post judgment interest, under 28 U.S.C. § 1961 (a), begins to accrue on federal court's award of attorneys' fees, 111 ALR Fed. 615.

## 9-12-11. Sureties and endorsers to be identified in judgment.

In all judgments against sureties or endorsers on any draft, promissory note, or other instrument in writing, the plaintiff or his attorney shall designate and identify the relation of the parties under the contract on which the judgment is rendered. (Laws 1845, Cobb's 1851 Digest, p. 598; Laws 1850, Cobb's 1851 Digest, p. 600; Code 1863, § 3491; Code 1868, § 3514; Code 1873, § 3572; Code 1882, § 3572; Civil Code 1895, § 5343; Civil Code 1910, § 5938; Code 1933, § 110-306.)

## JUDICIAL DECISIONS

**This section was intended for benefit of surety or endorser.** If such surety or endorser discharges the judgment, the surety can have the control of it for the surety's reimbursement out of the maker or principal, without delay in procuring an order of court; however, compliance or noncompliance with this section cannot

benefit or injure the principal. *Woolfolk v. Kyle*, 48 Ga. 419 (1873).

**Judgment failing to describe security as security.** — Judgment is not void by reason of failing to describe the security as security, but is amendable. *Saffold v. Wade*, 56 Ga. 174 (1876).

**Plaintiff or attorney must specify**



**status of parties to promissory note.**

— Former Code 1933, §§ 110-306 and 110-307 (see now O.C.G.A. §§ 9-12-11 and 9-13-30) place the burden upon the plaintiff or the plaintiff's attorney in an action against a surety or an endorser on a promissory note to specify the status of

the parties to the note; when this was not done the judgment and execution should be corrected under former Code 1933, § 110-311 (see now O.C.G.A. § 9-12-14). *Franklin v. Sea Island Bank*, 120 Ga. App. 654, 171 S.E.2d 866 (1969).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 46 Am. Jur. 2d, Judgments, §§ 79, 80.

**C.J.S.** — 49 C.J.S., Judgments, § 117 et seq.

**9-12-12. Judgment for costs against fiduciary.**

When the verdict of a jury is against an executor, administrator, or other trustee in his representative character, a judgment for costs shall be entered against him in the same character. (Orig. Code 1863, § 3493; Code 1868, § 3516; 1873, § 3574; Code 1882, § 3574; Civil Code 1895, § 5344; Civil Code 1910, § 5939; Code 1933, § 110-307.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 20 Am. Jur. 2d, Costs, § 86 et seq.

**9-12-13. Amount of judgment on bond.**

All judgments entered against the obligors on any bond, whether official or voluntary, shall be for the amount of damages found by the verdict of the jury and not for the penalty thereof. (Laws 1847, Cobb's 1851 Digest, p. 502; Code 1863, § 3494; Code 1868, § 3517; Code 1873, § 3575; Code 1882, § 3575; Civil Code 1895, § 5345; Civil Code 1910, § 5940; Code 1933, § 110-308.)

**Cross references.** — Measure of damages in actions on official bonds for misconduct of officer, § 45-4-29.

**JUDICIAL DECISIONS**

**No recovery of amount greater than penalty.** — Sureties of a sheriff, after recoveries have been had against the sureties to the amount of the sureties' bond, may defend themselves at law against all pending or future suits on that ground. *Bothwell v. Sheffield*, 8 Ga. 569 (1850).

Penalty in bond being a certain sum, the surety is not liable thereon for more

than that sum, with interest. *Westbrook v. Moore*, 59 Ga. 204 (1877).

This section does not provide for recovery against surety of an amount greater than the penalty of the bond; but rather this section provides for a lesser recovery. *Gullatt v. Blankenship*, 42 Ga. App. 139, 155 S.E. 353 (1930).

**Peace bond.** — In a suit against the obligor and the obligor's sureties in a



peace bond for a breach of peace, judgment for the full amount of the penalty stipulated in the bond will be awarded against the defendant and the defendant's sureties in case of a recovery. *Shirley v. Terrell*, 134 Ga. 61, 67 S.E. 436 (1910).

**Bond in bastardy proceedings.** — When it did not appear either from the allegations in the petition or from the evidence adduced that the bond sued on was the statutory bond required in bastardy proceedings, the only recovery permissible was the amount of the actual damage sustained as a result of the

breach of the bond. *Graves v. Campbell*, 33 Ga. App. 505, 126 S.E. 854 (1925), later appeal, 35 Ga. App. 418, 133 S.E. 267 (1926).

**Subcontractor bonds.** — Surety on performance and payment bonds for a subcontractor could not be held liable to the general contractor for both the 25 percent penalty for bad faith and for attorney's fees and expenses of litigation. *Congress Re-Insurance Corp. v. Archer-Western Contractors*, 226 Ga. App. 829, 487 S.E.2d 679 (1997).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 12 Am. Jur. 2d, Bonds, § 37 et seq.

**ALR.** — Validity of judgment entered on appeal or supersedeas bond without previous notice and opportunity to be heard, 86 ALR 308.

Entire penalty as recoverable for breach

of bond given to public as condition of license or other privilege, or conditioned on compliance with law, 103 ALR 405.

Attorneys' fees as element of damages allowable in action on injunction bond, 164 ALR 1088.

### 9-12-14. Amendment of judgment to conform to verdict.

A judgment may be amended by order of the court to conform to the verdict upon which it is predicated, even after an execution issues. (Orig. Code 1863, § 3424; Code 1868, § 3444; Code 1873, § 3494; Code 1882, § 3494; Civil Code 1895, § 5113; Ga. L. 1902, p. 55, § 1; Civil Code 1910, § 5697; Code 1933, § 110-311.)

**Cross references.** — Amendment of findings and amendment of judgment upon motion of party, § 9-11-52.

### JUDICIAL DECISIONS

**Judgment must conform to reasonable intendment of verdict** upon which the judgment is based, and may be amended by order of court so as to conform to the verdict, even after execution has been issued. *Morris v. Bell*, 100 Ga. App. 341, 111 S.E.2d 270 (1959).

**Amendment may be made after execution**, even though the execution is satisfied. *Dixon v. Mason*, 68 Ga. 478 (1882); *Elliott v. Wilks*, 16 Ga. App. 466, 85 S.E. 679 (1915).

**Judgment must be amended by inspection of the record**, including the verdict and pleas; the grounds cannot be

proved by parol evidence. *Dixon v. Mason*, 68 Ga. 478 (1882); *Miller v. Jackson*, 49 Ga. App. 309, 175 S.E. 409 (1934); *Allen v. Community Loan & Inv. Corp.*, 78 Ga. App. 611, 51 S.E.2d 872 (1949).

**Claim not raised before trial court could not be raised for first time on appeal.** — Trial court properly denied a motion to correct a judgment entered against two debtors and their guarantors, five years and eight months after the expiration of the term of court in which the judgment was entered, as they failed to show any entitlement to relief or exception as to why they could not have timely



sought the relief requested, and the debtors and their guarantors failed to raise a claim regarding O.C.G.A. § 9-12-14 in the court below, so it was not properly before the court. *De La Reza v. Osprey Capital, LLC*, 287 Ga. App. 196, 651 S.E.2d 97 (2007), cert. denied, No. S07C1928, 2007 Ga. LEXIS 819 (Ga. 2007).

**When judgment enlarges on the verdict** the judgment may be amended to conform thereto. *Segers v. Williams*, 147 Ga. 146, 93 S.E. 81 (1917).

**Judgment enlarging on a verdict may be amended** to conform thereto, even if the judgment includes a party defendant against whom the jury made no finding. *Rucker v. Williams*, 129 Ga. 828, 60 S.E. 155 (1908).

**One may prop the execution by working on the judgment**, though one cannot prop the levy by working on the execution. *Pound v. Faulkner*, 193 Ga. 413, 18 S.E.2d 749 (1942).

**Amendment may be had at a subsequent term.** *King v. Rodgers*, 22 Ga. App. 198, 95 S.E. 766 (1918).

**Modification after end of term allowed when merits not affected.** — Trial court does not err in modifying the court's original order after the end of the court's term since the subsequent modification in no way affected the merits. *Burns v. Fedco Mgt. Co.*, 168 Ga. App. 15, 308 S.E.2d 38 (1983).

**Amendment may relate back** to the subject matter of the original verdict and judgment, and is not the same thing as setting aside one judgment and entering another; interest is allowable on the judgment on the verdict. *Giant Peanut Co. v. Carolina Chems., Inc.*, 135 Ga. App. 597, 218 S.E.2d 305 (1975).

**Motion to amend made nine years after the judgment held not barred.** *Rucker v. Williams*, 129 Ga. 828, 60 S.E. 155 (1908).

**Even after judgment has been reviewed by Supreme Court** and affirmed, the judgment may be amended. *Moses v. Eagle & Phenix Mfg. Co.*, 68 Ga. 241 (1881).

**Amendment after issuance of writ of fieri facias.** — Amendments to judgments may be made in a proper case even after a writ of fieri facias has issued, and

the fact that the case has been affirmed by an appellate court in the meantime does not prevent such amendment. *Giant Peanut Co. v. Carolina Chems., Inc.*, 135 Ga. App. 597, 218 S.E.2d 305 (1975).

**Eliminating illegal interest.** — When an affidavit of illegality was interposed to a writ of fieri facias upon the ground that the judgment upon which the fieri facias issued included certain interest not warranted by the pleadings, it was not error, as against the defendant, to amend the judgment and fieri facias so as to eliminate the illegal interest, and thereafter to render judgment against the affidavit of illegality. *Haygood v. E.B. Clark Co.*, 30 Ga. App. 392, 118 S.E. 461 (1923).

**Modification of decree after expiration of term.** — After expiration of the term at which a decree was entered, it is out of the power of the court to modify and revise the decree in any matter of substance or in any matter affecting the merits. *Phillips v. Bowen*, 206 Ga. 268, 56 S.E.2d 503 (1949); *Reid v. Strickland*, 115 Ga. App. 394, 154 S.E.2d 778 (1967).

**Judgment bears upon matters in issue at time of the judgment's rendition**, and cannot be amended so as to conform to facts not adjudicated at the time. *Scarborough v. Merchants & Farmers Bank*, 131 Ga. 590, 62 S.E. 1040 (1908); *Richards v. McHan*, 139 Ga. 37, 76 S.E. 382 (1912); *Phillips v. Bowen*, 206 Ga. 268, 56 S.E.2d 503 (1949).

**When a judgment does not follow the verdict** upon which the judgment was issued, the judgment may be amended by order of the court having rendered the judgment so as to make the judgment conform thereto. *Powell v. Moore*, 202 Ga. 62, 42 S.E.2d 110 (1947).

**Revision nunc pro tunc.** — Judgment may be revised or amended, or entered of record, nunc pro tunc, on proper motion, at a term subsequent to that at which the judgment was rendered, so as to make the judgment speak the truth of the decision that was actually rendered, or to make the judgment conform to the verdict. *Allen v. Community Loan & Inv. Corp.*, 78 Ga. App. 611, 51 S.E.2d 872 (1949).

**Amendment concerning things oc-**



**curing subsequent to judgment.** — Judgment which follows a verdict that is in conformity with the issues made by the pleadings cannot, at a subsequent term, be amended on motion, since the matter sought by amendment concerns things that occurred subsequent to the judgment, or as to matters that could have been determined on the trial. *Phillips v. Bowen*, 206 Ga. 268, 56 S.E.2d 503 (1949).

**Amendment eliminating party's interest in contract.** — In a breach of contract case arising out of an LLC operating agreement, it was not clear that the jury intended to extinguish a former LLC member's interest in the operating agreement by the jury's verdict awarding the former member damages, and under O.C.G.A. §§ 9-12-7, 9-12-9, and 9-12-14, the trial court could not vary the judgment from the terms of the verdict. *Kaufman Development Partners, L.P. v. Eichenblatt*, 324 Ga. App. 71, 749 S.E.2d 374 (2013).

**Judgment which, although dormant, still survives** as a debt of record, enforceable by suit, may be so amended as to show an irregularity therein. *Leonard v. Collier*, 53 Ga. 387 (1874); *Williams v. Merritt*, 109 Ga. 217, 34 S.E. 1012 (1900).

**Amending matters precluded by res judicata not permitted.** *Glennville Bank v. Deal*, 146 Ga. 127, 90 S.E. 958 (1916); *Deal v. Glennville Bank*, 21 Ga. App. 619, 94 S.E. 835 (1918).

**As to matters of form ascertainable from the pleadings and verdict** in a case, the decree entered thereon may be amended at any time, even after execution. *Reid v. Strickland*, 115 Ga. App. 394, 154 S.E.2d 778 (1967).

**When a judgment is improperly entered as to matters of form**, the decree entered thereon may be amended at any time, even after execution. *Harrell v. Kelley*, 21 Ga. App. 525, 94 S.E. 830 (1918).

**Typographical errors.** — When errors appearing in a judgment as finally entered up are typographical, the errors may be corrected by proper amendment. *Clark v. Jackson*, 23 Ga. App. 269, 97 S.E. 883 (1919).

**Amendment to show judgment is against defendants.** — When a verdict

is rendered against the defendants in an action, and the judgment does not show that the judgment is against the defendants, the judgment may be amended to conform to the verdict and show that the judgment is against the defendants. *Miller v. Jackson*, 49 Ga. App. 309, 175 S.E. 409 (1934).

**When a verdict is based on an agreement of counsel**, but nothing in the pleadings or verdict shows this fact, the court does not err in denying a motion to amend the judgment entered on the verdict so as to conform the judgment to the true intent of the agreement at a subsequent term of court. *Reid v. Strickland*, 115 Ga. App. 394, 154 S.E.2d 778 (1967).

**Amending to provide for payment of costs.** — When a defendant is convicted, but the judge fails to enter a judgment for costs, it is proper for the judge to enter a nunc pro tunc order amending the former judgment to provide for the payment of costs, after the expiration of the term at which the judgment was entered, and even after an execution for the costs has issued. *Pound v. Faulkner*, 193 Ga. 413, 18 S.E.2d 749 (1942).

**Amending to incorporate plat utilized by jury.** — Trial judge has power to amend a judgment to incorporate the plat utilized by the jury in determining the verdict and thereby conform the description of the condemned lands to the evidence. *Norton Realty & Loan Co. v. Board of Educ.*, 129 Ga. App. 668, 200 S.E.2d 461 (1973).

**When judgment against a garnishee fails to conform** to the verdict, the judgment may be amended to conform therewith. *Merchants' Grocery Co. v. Albany Hdwe. & Mill Supply Co.*, 44 Ga. App. 112, 160 S.E. 658 (1931).

**Power of courts to correct clerical errors and misprisions** and to make the record speak the truth by nunc pro tunc amendments after the term does not enable the courts to change the court's judgments in substance or in any material respect. *Rogers v. Rigell*, 183 Ga. 455, 188 S.E. 704 (1936).

**Lapse of time is not sufficient to constitute a bar.** *Segers v. Williams*, 147 Ga. 146, 93 S.E. 81 (1917).

**Amendment must be in writing and signed by the judge;** there is no such



thing as an oral amendment of a sentence or judgment. *Mathews v. Swatts*, 16 Ga. App. 208, 84 S.E. 980 (1915).

**Power to amend and revise does not include** the power to supply judicial omissions so as to include what a court might or should have decided, but did not actually decide. *Allen v. Community Loan & Inv. Corp.*, 78 Ga. App. 611, 51 S.E.2d 872 (1949).

**Judgment changing verdict in matters of substance.** — When the trial judge entered a lengthy judgment, which changed the verdict in matters of substance, and added numerous powers and directives which were not contained in the verdict, which the judge had no authority to do, the court may be directed to modify that portion of the decree involved in the litigation to conform to the verdict of the jury. *Hiscock v. Hiscock*, 227 Ga. 329, 180 S.E.2d 730 (1971).

**Instance of amendment of judgment error.** — It was error for the court to amend a judgment in trover based on a verdict finding a part of the property to belong to the defendant, thereby rendering a money judgment in favor of the defendant as to the property so found for the defendant, when the plaintiff's petition did not allege the value of the property found for the defendant and the jury made no finding as to its value. *Betts v. Mathews*, 72 Ga. App. 678, 34 S.E.2d 729 (1945).

**Specification of status of parties to promissory note.** — Former Civil Code 1933, §§ 110-306 and 39-107 (see now O.C.G.A. §§ 9-12-11 and 9-13-30) placed the burden upon the plaintiff or the plaintiff's attorney in an action against a surety or an endorser on a promissory note to specify the status of the parties to the note. When this was not done, the judgment and execution should be corrected under former Code 1933, § 110-311 (see now O.C.G.A. § 9-12-14). *Franklin v. Sea Island Bank*, 120 Ga. App. 654, 171 S.E.2d 866 (1969).

**When an excess penalty included in a tax execution is illegal**, such excess does not invalidate the entire claim, but requires only a partial abatement or

amendment; a dismissal of the execution for this reason is unauthorized. *State Revenue Comm'n v. National Biscuit Co.*, 49 Ga. App. 409, 175 S.E. 607 (1934).

**Power of a justice of the peace to amend a judgment** rendered by the justice of the peace is limited to matters of form. The justice of the peace has no power to change its legal tenor or effect. *Barnes v. Mechanics' Sav. Bank*, 22 Ga. App. 214, 95 S.E. 757 (1918).

**Justice of peace court without authority to amend.** — While in courts of record, judgments are in the breast of the court until the end of the term, and may be amended, modified, set aside, or changed, in form or effect, at the pleasure of the court, this power does not exist in justice of the peace courts. *Field v. Jordan*, 124 Ga. 685, 52 S.E. 885 (1906); *Barnes v. Mechanics' Sav. Bank*, 22 Ga. App. 214, 95 S.E. 757 (1918); *Reid v. Strickland*, 115 Ga. App. 394, 154 S.E.2d 778 (1967).

**Cited in** *Leonard v. Collier*, 53 Ga. 387 (1874); *Gay v. Cheney*, 58 Ga. 304 (1879); *Moses v. Eagle & Phenix Mfg. Co.*, 68 Ga. 241 (1881); *Sanders v. Williams*, 75 Ga. 283 (1885); *Merchants Grocery Co. v. Albany Hdwe. & Mill Supply Co.*, 44 Ga. App. 412, 160 S.E. 658 (1931); *Neely v. Mobley*, 49 Ga. App. 541, 176 S.E. 527 (1934); *Brown v. Cole*, 196 Ga. 843, 28 S.E.2d 76 (1943); *McCartney v. McCartney*, 217 Ga. 200, 121 S.E.2d 785 (1961); *Hesters v. Sammons*, 106 Ga. App. 126, 126 S.E.2d 484 (1962); *Davis v. Howell*, 218 Ga. 169, 126 S.E.2d 766 (1962); *Davis v. Howell*, 220 Ga. 287, 138 S.E.2d 563 (1964); *Johnson v. Johnson*, 223 Ga. 833, 158 S.E.2d 383 (1967); *Parker v. Spurlin*, 227 Ga. 183, 179 S.E.2d 251 (1971); *Rosenberg v. Mossman*, 140 Ga. App. 694, 231 S.E.2d 417 (1976); *Tingle v. Cate*, 142 Ga. App. 467, 236 S.E.2d 127 (1977); *Insurance Co. v. Dills*, 145 Ga. App. 183, 243 S.E.2d 549 (1978); *Lowe v. Lowe*, 243 Ga. 398, 254 S.E.2d 323 (1979); *Hoffman v. Clendenon*, 150 Ga. App. 98, 256 S.E.2d 676 (1979); *American Petro. Prods., Inc. v. Mom & Pop Stores, Inc.*, 231 Ga. App. 1, 497 S.E.2d 616 (1998); *Taylor v. Peachbelt Props.*, 293 Ga. App. 335, 667 S.E.2d 117 (2008).



## RESEARCH REFERENCES

**C.J.S.** — 49 C.J.S., Judgments, §§ 77 et seq., 368.

**ALR.** — Power of court to amend indictment, 7 ALR 1516; 68 ALR 928.

Power of appellate court to remit portion of verdict or judgment covering period

barred by statute of limitations, 26 ALR2d 956.

Court's power to increase amount of verdict or judgment over either party's refusal or failure to consent to addition, 56 ALR2d 213.

## 9-12-15. Judgment aided by verdict or amendable not set aside.

A judgment may not be set aside for any defect in the pleadings or the record that is aided by verdict or amendable as a matter of form. (Orig. Code 1863, § 3509; Code 1868, § 3532; Code 1873, § 3590; Code 1882, § 3590; Civil Code 1895, § 5365; Civil Code 1910, § 5960; Code 1933, § 110-705; Ga. L. 1984, p. 22, § 9.)

**Cross references.** — Amendment of findings and amendment of judgment upon motion of party, § 9-11-52. Relief from judgments generally, § 9-11-60. Corresponding provision relating to criminal procedure, § 17-9-62.

**Law reviews.** — For comment on *Flanigan v. Hutchins*, 164 Ga. 313, 138 S.E. 793 (1927), see 1 Ga. B.J. 48 (1927).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### SPECIFIC APPLICATION

### General Consideration

**Editor's notes.** — Many of the cases cited under O.C.G.A. § 9-12-15 were decided under procedure obtaining prior to enactment of the Civil Practice Act of 1966 (Chapter 11 of this title). See O.C.G.A. § 9-11-60 as to relief from judgments under the Civil Practice Act.

**Code section carrying forward these provisions.** — Provisions of former Code 1933, § 110-705 (see now O.C.G.A. § 9-12-15) were substantially carried forward in Ga. L. 1974, p. 1138, § 1 (see now O.C.G.A. § 9-11-60). *Cook v. Bright*, 150 Ga. App. 696, 258 S.E.2d 326 (1979).

**Scope of section.** — Under O.C.G.A. § 9-12-15, a judgment may not be set aside for any defect that is aided by a verdict or amendable as to matter of form. *Grier v. Employees Fin. Servs.*, 158 Ga. App. 813, 282 S.E.2d 342 (1981).

**This section is applicable to motions in arrest of judgments,** not to

motions for new trial, and seems then to apply to formal defects only. *City of Rome v. Shropshire*, 112 Ga. 93, 37 S.E. 168 (1900).

**Defect may be cured by verdict.** — Though a cause of action may be defectively set forth, the defect may be cured by the verdict. *Pattillo v. Mangum*, 179 Ga. 784, 177 S.E. 604 (1934).

Motion to set aside a judgment will lie for any defect not amendable which appears on the face of the record or pleadings, but since the verdict cures any defect which might have been corrected by amendment, even though it could be assumed that the plaintiff could have been required to amend the plaintiff's petition so as to allege specifically and in terms that the defendant was indebted to the plaintiff as payee on unconditional, undorsed, and unpaid promise to pay, the petition did not fail to set forth a cause of action, it being the general rule that the



payee of a note is presumed to continue in its ownership. *Hobbs v. Citizens Bank*, 32 Ga. App. 522, 124 S.E. 72 (1924). See also *Strickland v. Citizens Nat'l Bank*, 15 Ga. App. 464, 83 S.E. 883 (1914); *Brooke v. Fouts*, 37 Ga. App. 563, 140 S.E. 902 (1927).

Unless a pleading shows on the pleading's face that a cause of action does not exist, or the pleading is so defective that the pleading could not be amended at all, or the defect is of such character as renders unenforceable or meaningless a verdict and judgment based thereon, defects in the pleading are cured by the verdict on the theory that there is a conclusive presumption that the jury had before it sufficient evidence to authorize the verdict on every essential ingredient, necessary for the verdict's rendition, which would have been admissible or relevant under any proper amendment. *J.R. Watkins Co. v. Herring*, 51 Ga. App. 396, 180 S.E. 525 (1935).

**Defect cured by judgment.** — Defect which would be amendable before verdict will be cured by the judgment in the case. *Mercer v. Nowell*, 179 Ga. 37, 175 S.E. 12 (1934).

**Defect making legal judgment impossible.** — Petition cannot be said to be so defective that no legal judgment can be rendered thereon when an amendment would have perfected the judgment. *Stowers v. Harris*, 194 Ga. 636, 22 S.E.2d 405 (1942).

If the pleadings are so defective that no legal judgment can be rendered, the judgment will be arrested or set aside. *Auld v. Schmelz*, 199 Ga. 633, 34 S.E.2d 860 (1945).

**Motion in arrest of judgment can be sustained only for defects appearing on the face of the pleadings which could not be cured by amendment and are not aided by the verdict.** *Pattillo v. Mangum*, 179 Ga. 784, 177 S.E. 604 (1934).

**Facts necessary to render judgment subject to motion in arrest of judgment.** — Petition, although defective and subject to general demurrer (now motion to dismiss), in that the petition omits to set forth all the necessary ingredients of a cause of action, will not render the judgment based thereon subject to a mo-

tion in arrest of judgment, unless the petition shows on the petition's face that a cause of action did not exist, or that the petition is so defective that the petition could not be amended at all, or that the defect in the petition is of such character as renders unenforceable or meaningless the verdict and judgment based thereon. This must be the rule, for the reason that, save for the exceptions stated, the defects in the pleadings are cured by the verdict, on the theory that there is a conclusive presumption that the jury had before it sufficient evidence to authorize the verdict on every essential ingredient, necessary for the judgment's rendition, which would have been admissible or relevant under any proper amendment. *Rollins v. Personal Fin. Co.*, 49 Ga. App. 365, 175 S.E. 609 (1934); *Burch v. Dodge County*, 193 Ga. 890, 20 S.E.2d 428 (1942); *Cravey v. Citizens & S. Nat'l Bank*, 110 Ga. App. 284, 138 S.E.2d 321 (1964); *Adams v. Morgan*, 114 Ga. App. 180, 150 S.E.2d 556, cert. dismissed, 222 Ga. 280, 152 S.E.2d 692 (1966).

**Motion to arrest held to be without merit.** — When nowhere in the motion for arrest was it alleged that the judgment sought to be arrested was procured by accident, mistake, or fraud or through any defect not amendable appearing on the face of the record or pleadings, or by perjury, or any other irregularity, the motion was without merit. *Stefanick v. Ouellette*, 97 Ga. App. 644, 104 S.E.2d 156 (1958).

**When motion to arrest may be interposed.** — Motion in arrest of or to set aside a judgment may be interposed when it appears from the face of the record or the pleadings that no cause of action exists against the defendant. *Smith v. Franklin Printing Co.*, 54 Ga. App. 385, 187 S.E. 904 (1936).

**Defenses in motion to arrest judgment barred by waiver.** — When the defendant is served, and appears and pleads to the merits, and a verdict and judgment are rendered against the defendant, the defendant cannot, in a motion to arrest the judgment, urge matters of defense which were put in issue and passed upon by the court and jury. *Olshine v. Bryant*, 55 Ga. App. 90, 189 S.E. 572 (1936).



**General Consideration (Cont'd)**

**Test for collateral attack on judgment.** — One of the tests in determining whether a judgment is absolutely void and subject to collateral attack is whether the party attacking the judgment had been a party thereto. A motion in arrest of judgment could have been sustained for defects appearing in the face of the pleadings, which could not have been aided by amendment or cured by the verdict. *Deck v. Shields*, 195 Ga. 697, 25 S.E.2d 514 (1943).

**Cited in** *Hudson v. Cohen*, 34 Ga. App. 119, 128 S.E. 205 (1925); *Henderson v. Ellarbee*, 35 Ga. App. 5, 131 S.E. 524 (1926); *Flanigan v. Hutchins*, 164 Ga. 313, 138 S.E. 793 (1927); *Weems v. Kidd*, 37 Ga. App. 8, 138 S.E. 863 (1927); *Willcox v. Beechwood Band Mill Co.*, 166 Ga. 367, 143 S.E. 405 (1928); *Merchants' Grocery Co. v. Albany Hdwe. & Mill Supply Co.*, 44 Ga. App. 112, 160 S.E. 658 (1931); *McBride v. Sconyers*, 46 Ga. App. 235, 167 S.E. 309 (1933); *Hayes v. American Bankers' Ins. Co.*, 46 Ga. App. 552, 167 S.E. 731 (1933); *Henderson v. American Hat Mfg. Co.*, 57 Ga. App. 10, 194 S.E. 254 (1937); *Underwood v. D.C. Heath & Co.*, 64 Ga. App. 180, 12 S.E.2d 464 (1940); *Deck v. Shields*, 195 Ga. 697, 25 S.E.2d 514 (1943); *Veneer Mfg. Co. v. Hill*, 72 Ga. App. 28, 32 S.E.2d 838 (1945); *Barbee v. Barbee*, 201 Ga. 763, 41 S.E.2d 126 (1947); *McEntyre v. Burns*, 81 Ga. App. 239, 58 S.E.2d 442 (1950); *Wilder v. Rowell*, 83 Ga. App. 585, 64 S.E.2d 96 (1951); *Miller v. Turner*, 209 Ga. 255, 71 S.E.2d 517 (1952); *Hinkle v. Hinkle*, 209 Ga. 554, 74 S.E.2d 657 (1953); *Harper v. Mayes*, 210 Ga. 183, 78 S.E.2d 490 (1953); *Busey v. Milam*, 95 Ga. App. 198, 97 S.E.2d 533 (1957); *Stefanick v. Ouellette*, 97 Ga. App. 644, 104 S.E.2d 156 (1958); *Crawford v. Sumerau*, 101 Ga. App. 32, 112 S.E.2d 682 (1960); *Rielly v. Crook*, 112 Ga. App. 334, 145 S.E.2d 110 (1965); *Saturday v. Saturday*, 113 Ga. App. 251, 147 S.E.2d 798 (1966); *Daniels v. Sanders*, 114 Ga. App. 495, 151 S.E.2d 820 (1966); *Bragg v. Bragg*, 224 Ga. 294, 161 S.E.2d 313 (1968); *Alexander v. Askin Squire Corp.*, 144 Ga. App. 662, 242 S.E.2d 324 (1978); *Simonds v. Simonds*, 145 Ga. App. 227,

243 S.E.2d 545 (1978); *Law Offices of Johnson & Robinson v. Fortson*, 175 Ga. App. 706, 334 S.E.2d 33 (1985); *Matthews v. Neal, Greene & Clark*, 177 Ga. App. 26, 338 S.E.2d 496 (1985).

**Specific Application**

**When there is no attack on the verdict in the motion in arrest of judgment**, nor any enumeration of error attacking the verdict because of lack of evidence or for any other reason, no consideration of the evidence is necessary, and there being no attack on the verdict, the verdict must stand. *Adams v. Morgan*, 114 Ga. App. 180, 150 S.E.2d 556, cert. dismissed, 222 Ga. 820, 152 S.E.2d 693 (1966).

**Distinction between an irregularity and a complete defect** in the proceedings is that the former may be waived by the adverse party, but not the latter. *Beall v. Blake*, 13 Ga. 217, 58 Am. Dec. 513 (1853).

**Irregularity in the direction of the process of a suit is amendable.** *Pearson v. Jones*, 18 Ga. App. 448, 89 S.E. 536 (1916); *Gray v. Riley*, 47 Ga. App. 348, 170 S.E. 537 (1933).

**When irregularities in the record can be corrected by amendment**, the judgment will not be arrested or set aside. *Homasote Co. v. Stanley*, 104 Ga. App. 636, 122 S.E.2d 523 (1961); *Norton Realty & Loan Co. v. Board of Educ.*, 129 Ga. App. 668, 200 S.E.2d 461 (1973).

**Judgment curing defect in summons or bill of particulars.** — Irregularity in the summons or bill of particulars attached thereto, which is not excepted to by the defendant, is waived by the defendant, and cured by a judgment rendered on the merits of the case. *Harris v. Bennett Bros.*, 72 Ga. App. 589, 34 S.E.2d 615 (1945).

**Degree of discretion for setting aside judgment based on jury verdict.** — Broad discretion in judge to arrest or set aside a judgment during the term in which the judgment was rendered, for defects not amendable which appear on the face of the record or pleadings, does not apply to a judgment based on a jury verdict. *Homasote Co. v. Stanley*, 104 Ga. App. 636, 122 S.E.2d 523 (1961).



**When motion to arrest default judgment permitted.** — When a default judgment has been rendered, after the time for opening the default has passed, the defendant may move in arrest thereof for any defect not amendable which appears on the face of the record or pleadings, but such judgment may not be arrested or set aside for any defect in the pleadings that is aided by the verdict. *Whitley v. Currington*, 105 Ga. App. 681, 125 S.E.2d 678 (1962).

**Motion in arrest of judgment based on a deficiency in the petition** on which judgment was rendered is insufficient when such motion and the record fail to show, in addition to the fact that the petition did not state a cause of action, the further fact that no cause of action existed. *Whitley v. Currington*, 105 Ga. App. 681, 125 S.E.2d 678 (1962).

**Service defect on face of record.** — When a defect in the service of process appears on the face of the record, it is subject to a motion in arrest or a motion to set aside the judgment, and no traverse is necessary. *Jennings v. Davis*, 92 Ga. App. 265, 88 S.E.2d 544 (1955).

**Matters not appearing on face of record.** — Any motion to set aside a verdict, based on matters not appearing on the face of the record, is a motion for a new trial, and is subject to all the rules of law governing such motions. *Johnston v. Ford*, 43 Ga. App. 132, 158 S.E. 527 (1931).

Motion to set aside a verdict based on matters not appearing on the face of the record is not an available remedy to avoid a verdict, unless the motion is of such form and content as to be in substance a motion for a new trial, and complies with the rules governing such a motion. *Wrenn v. Allen*, 180 Ga. 613, 180 S.E. 104 (1935).

**Erroneous rulings on pleadings** are not proper grounds for motions in arrest or to set aside judgments, nor are rulings on pleadings proper grounds of a motion for new trial. *Hambrick v. Nova*, 112 Ga. App. 258, 144 S.E.2d 922 (1965).

**Waiver prevents attack on jurisdiction in motion to arrest judgment.** — When a defendant appears and pleads to the merits of a case, without pleading to the jurisdiction of the court, and without

excepting thereto, the defendant thereby admits the jurisdiction of the court; and, after verdict and judgment, the question of jurisdiction cannot be raised in a motion to arrest the judgment. *Olshine v. Bryant*, 55 Ga. App. 90, 189 S.E. 572 (1936).

**Pendency of undisposed motion to dismiss.** — When a petition to vacate and set aside the judgment could have been amended as to meet grounds of demurrer (now motion to dismiss) interposed by the defendant, the pendency of the demurrers undisposed of did not constitute such a defect appearing upon the face of the record as would have authorized arresting or setting aside the judgment. *Oliver v. Fireman's Ins. Co.*, 42 Ga. App. 99, 155 S.E. 227 (1930), rev'd on other grounds, 46 Ga. App. 507, 167 S.E. 909 (1932).

**Procedure required for setting aside.** — Judgment based on the jury's verdict cannot be set aside by a motion to set aside as long as the verdict upon which the judgment is based stands and has not been set aside by proper procedure. *Adams v. Morgan*, 114 Ga. App. 180, 150 S.E.2d 556, cert. dismissed, 222 Ga. 820, 152 S.E.2d 693 (1966).

**Negligence in failing to examine original pleadings.** — Negligence of a client or the client's attorney in failing to examine the original pleadings in a case is not ground for setting aside the judgment. *Rahal v. Titus*, 110 Ga. App. 122, 138 S.E.2d 68 (1964).

**Defects in matters of form can be amended.** *Homasote Co. v. Stanley*, 104 Ga. App. 636, 122 S.E.2d 523 (1961).

**Irregularity in judgment as to the judgment's amount** may be corrected by amendment. *Homasote Co. v. Stanley*, 104 Ga. App. 636, 122 S.E.2d 523 (1961).

**Sums recoverable determinable by mathematical calculation.** — When substantial issues between parties in an attachment proceeding had been determined and the sums recoverable from funds in the hands of the garnishees to make up the amount of the verdict were easily ascertainable by subtraction, judgment for the plaintiff could be corrected by amendment, and it was not error to sustain the general demurrer (now motion to dismiss) to the defendant's motion in ar-



**Specific Application** (Cont'd)

rest of judgment. *Homasote Co. v. Stanley*, 104 Ga. App. 636, 122 S.E.2d 523 (1961).

**Judgment for larger amount than sued for.** — Judgment for a larger amount than sued for is a mere irregularity which can be amended by a write off. *Almon v. Citizens & S. Nat'l Bank*, 108 Ga. App. 799, 134 S.E.2d 435 (1963).

**Return of service is an amendable defect.** *Love v. National Liberty Ins. Co.*, 157 Ga. 259, 121 S.E. 648 (1924).

**Judgment not set aside when defects amendable.** — After judgment in attachment, the judgment will not be set aside on account of amendable defects in the bond and attachment. *Steers & Co. v. Morgan & Armstrong*, 66 Ga. 552 (1881).

Final judgment for divorce will not be set aside on the ground that petition does not set forth a cause of action since the deficiency in the petition is amendable and cured by the verdict. *Guthas v. Guthas*, 207 Ga. 177, 60 S.E.2d 370 (1950).

Order of forfeiture was not set aside pursuant to O.C.G.A. § 9-12-15 as the failure to verify a petition was an amendable defect. *McDowell v. State of Ga.*, 290 Ga. App. 538, 660 S.E.2d 24 (2008).

**When defect in attachment amendable.** — If an affidavit upon which the attachment was issued is to be construed as swearing to the grounds of attachment equivocally, as contended in stating the grounds of the motion to set aside, the defect was amendable. *McDonald v. W.W. Kimball Co.*, 144 Ga. 105, 86 S.E. 234 (1915).

**Failure in a trover suit to allege a demand** was an amendable defect. *Harris v. Bennett Bros.*, 72 Ga. App. 589, 34 S.E.2d 615 (1945).

**Absence of prayers asking court to decree title to property to plaintiff.** — Petition for divorce and alimony, containing allegations that title and ownership of certain real and personal property were in plaintiff's name shows on its face a purpose to have title to such property decreed in the plaintiff, and the absence of specific prayers that title be decreed in the plaintiff's name is an amendable defect, and the want of such prayers is cured by

judgment. *Armstrong v. Armstrong*, 206 Ga. 540, 57 S.E.2d 668 (1950).

**Divorce petition failing to request alimony.** — Divorce petition which gives no indication by its pleadings that the wife is seeking an alimony judgment cannot be amended by the introduction of evidence when the husband has filed no pleadings and does not litigate the issues at the trial. *Lambert v. Gilmer*, 228 Ga. 774, 187 S.E.2d 855 (1972).

**Judgment by a judge without a jury has the effect of a verdict**, insofar as amendable defects in the pleadings are concerned. *Davis v. Bray*, 119 Ga. 220, 46 S.E. 90 (1903); *Harvard v. Walton*, 243 Ga. 860, 257 S.E.2d 280 (1979).

**Proceeding to set aside judgment based on defective return.** — In a direct proceeding to set aside a judgment based on a defective return, the movant cannot rely on the incompleteness of the return but must affirmatively show that the service actually made was not such as is required by the statute. *Jones v. Bibb Brick Co.*, 120 Ga. 321, 48 S.E. 25 (1904).

**Failure to attach a bill of particulars to a declaration** can be cured by amendment, and is not a good ground to set aside a judgment thereon. *Wilson v. Strickler & Co.*, 66 Ga. 575 (1881); *Harris v. Bennett Bros.*, 72 Ga. App. 589, 34 S.E.2d 615 (1945); *Rich's, Inc. v. Coleman*, 116 Ga. App. 419, 157 S.E.2d 814 (1967).

**Petition of administrator to sell lands.** — Under former Civil Code 1910, § 4026 (see now O.C.G.A. § 53-8-23), the petition of an administrator for an order to sell the land of the administrator's intestate should set forth that such sale was necessary for the payment of the debts of the estate or for the purpose of distribution, but the omission of such an allegation was an amendable defect within the meaning of former Civil Code 1910, § 5960 (see now O.C.G.A. § 9-12-15), which was cured by a judgment granting leave to sell. *Laramore v. Dudley*, 145 Ga. 102, 88 S.E. 682 (1916).

**Petition to recover land and mesne profits.** — Omission of specific prayers has been held to be an amendable defect. For example, failure to pray for damages in a petition to recover land and mesne profits is amendable. *Fitzpatrick v.*



Paulding, 131 Ga. 693, 63 S.E. 213 (1908).

**Omission of a prayer for process from a petition** is an amendable defect. *Guthrie v. Spence*, 55 Ga. App. 669, 191 S.E. 188 (1937).

**Omission of prayer for finding of true line in processioning case.** — In a processioning case, omission of prayer that alleged true line be found and decreed was an amendable defect. *McCollum v. Thomason*, 32 Ga. App. 160, 122 S.E. 800 (1924).

**Issue as to entitlement to money recovery.** — When pleadings join issue as to whether the prevailing party is entitled to a recovery in money, the omission of a prayer for relief of that nature may be cured by amendment, and hence is not a ground of a motion in arrest of judgment. *Wright v. Florida-Georgia Tractor Co.*, 218 Ga. 824, 130 S.E.2d 736 (1963); *Betts v. First Ga. Bank*, 177 Ga. App. 359, 339 S.E.2d 616 (1985).

**Failure to include data in petition.** — Failure to include in the petition or exhibit the dates or other data upon which interest might be computed did not render the judgment unauthorized by the pleading. *Holmes v. Reville*, 27 Ga. App. 552, 109 S.E. 417 (1921).

**While a declaration did not allege any express agreement,** since the declaration did allege facts from which an agreement could be reasonably implied, the defect in the declaration was curable by amendment, and it was too late, after the verdict, to take advantage of the same by motion in arrest of judgment, the declaration in other respects setting forth a cause of action. *Moss & Co. v. Stokeley*, 95 Ga. 675, 22 S.E. 692 (1895).

**Failure to include names of beneficiaries in homestead.** — Failure to set out the names of all the beneficiaries in a

suit to subject homestead, and the informal way in which the property of the homestead estate was described, are defects which would be amendable before, and which would be cured by, a judgment in the case. *Wegman Piano Co. v. Irvine*, 107 Ga. 65, 32 S.E. 898, 73 Am. St. R. 109 (1899).

**Failure to allege defendant's residence.** — Omission to allege, in the declaration, that the defendant resides in the county where the suit is brought, is amendable, may be waived by pleading to the merits, and is not good in arrest of judgment. *Raney v. McRae*, 14 Ga. 589, 60 Am. Dec. 660 (1854).

**Misjoinder of causes of action** could be eliminated before the verdict by appropriate amendment under operation of the rule that a defect in a petition which is amendable is cured by the verdict, such a defect unobjected to at the proper time before the verdict, would be cured by the verdict. *Georgia R.R. & Banking Co. v. Tice*, 124 Ga. 459, 52 S.E. 916, 4 Ann. Cas. 200 (1905); *Morgan v. Morgan*, 157 Ga. 907, 123 S.E. 13 (1924).

**Objection to a petition on the ground of misjoinder of parties** affords no ground to arrest judgment. *Love v. National Liberty Ins. Co.*, 157 Ga. 259, 121 S.E. 648 (1924).

**Motion to set aside applicable when motion to dismiss would have been.** — Motion to set aside a default judgment, on account of insufficiency of the petition, operates as a general demurrer (now motion to dismiss) to the petition; and any defect which could have been reached by general demurrer can, after a default judgment, be taken advantage of by a motion to arrest or set aside the judgment. *Sheffield v. Causey*, 12 Ga. App. 588, 77 S.E. 1077 (1913).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 46 Am. Jur. 2d, Judgments, § 130 et seq.

**C.J.S.** — 49 C.J.S., Judgments, §§ 54, 410.

**ALR.** — Failure of decree or order of distribution of decedent's estate to describe specifically the property or property

interests involved, or misdescription thereof, 120 ALR 630.

Correction of mistake in judgment entered under warrant of attorney to confess judgment, 144 ALR 830.

Power of court to award alimony or property settlement in divorce suit as af-



fectured by failure of pleading or notice to make a claim therefor, 152 ALR 445.

Necessity of notice of application or in-

tention to correct error in judgment entry, 14 ALR2d 224.

## 9-12-16. Validity of judgment when court does not have jurisdiction.

The judgment of a court having no jurisdiction of the person or the subject matter or which is void for any other cause is a mere nullity and may be so held in any court when it becomes material to the interest of the parties to consider it. (Orig. Code 1863, § 3513; Code 1868, § 3536; Code 1873, § 3594; Code 1882, § 3594; Civil Code 1895, § 5369; Civil Code 1910, § 5964; Code 1933, § 110-709.)

**Cross references.** — For corresponding provision relating to criminal procedure, see § 17-9-4.

**Law reviews.** — For comment on

Musgrove v. Musgrove, 213 Ga. 610, 100 S.E.2d 577 (1957), upholding the validity of a divorce decree, see 20 Ga. B.J. 548 (1958).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### JURISDICTION

#### SPECIFIC APPLICATION

1. IN GENERAL
2. DOMESTIC ISSUES

### General Consideration

**Principles of former Code 1933, § 110-709 (see now O.C.G.A. § 9-12-16) applied to Ga. L. 1974, p. 1138, § 1 (see now O.C.G.A. § 9-11-60(e)).** Canal Ins. Co. v. Cambron, 240 Ga. 708, 242 S.E.2d 32, cert. denied, 439 U.S. 805, 99 S. Ct. 61, 58 L. Ed. 2d 98 (1978).

**Section as remedy under O.C.G.A. § 9-11-60(e).** — Former Code 1933, § 110-709 (see now O.C.G.A. § 9-12-16) gave a remedy under subsection (e) of Ga. L. 1974, p. 1138, § 1 (see now O.C.G.A. § 9-11-60) to third parties who attack a judgment as void for any cause. Canal Ins. Co. v. Cambron, 240 Ga. 708, 242 S.E.2d 32, cert. denied, 439 U.S. 805, 99 S. Ct. 61, 58 L. Ed. 2d 98 (1978); Bonneau v. Ohme, 244 Ga. 184, 259 S.E.2d 631 (1979).

**“Void judgment” defined.** — Void judgment is no judgment. By it no rights are divested; from it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally

worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void. Stewart v. Golden, 98 Ga. 479, 25 S.E. 528 (1896); Shotkin v. State, 73 Ga. App. 136, 35 S.E.2d 556 (1945), cert. denied, 329 U.S. 740, 67 S. Ct. 56, 91 L. Ed. 638 (1946); Zachos v. Rowland, 80 Ga. App. 31, 55 S.E.2d 166 (1949); Adams v. Payne, 219 Ga. 638, 135 S.E.2d 423 (1964); Troup County Bd. of Comm’rs v. Public Fin. Corp., 109 Ga. App. 547, 136 S.E.2d 509 (1964).

**Effect on person against whom void judgment is rendered.** — As to the person against whom a void judgment professes to be rendered, it binds the person in no degree whatever, it has no effect as a lien upon the person’s property, it does not raise an estoppel against the person. As to the person in whose favor it professes to be, it places the person in no better position than the person occupied before; it gives the person no new right, but an attempt to enforce it will place the



person in peril. As to third persons, it can neither be a source of title nor an impediment in the way of enforcing their claims. *Shotkin v. State*, 73 Ga. App. 136, 35 S.E.2d 556 (1945), cert. denied, 329 U.S. 740, 67 S. Ct. 56, 91 L. Ed. 638 (1946); *Zachos v. Rowland*, 80 Ga. App. 31, 55 S.E.2d 166 (1949).

**Effect of subsequent actions on void judgment.** — Judgment really void cannot be vitalized by any subsequent action of the parties. *Troup County Bd. of Comm'rs v. Public Fin. Corp.*, 109 Ga. App. 547, 136 S.E.2d 509 (1964).

**Test to determine validity of judgment.** — One of the tests which can be applied to determine whether a judgment is void is whether the judgment can be set aside by motion in arrest of judgment. If the judgment can be arrested by motion, the judgment is always void. *Chapman v. Taliaferro*, 1 Ga. App. 235, 58 S.E. 128 (1907).

**Test for collateral attack on judgment.** — One of the tests in determining whether a judgment is absolutely void and subject to collateral attack is whether the party attacking the judgment had been a party thereto. Then a motion in arrest of judgment could have been sustained for defects appearing in the face of the pleadings, which could not have been aided by amendment or cured by the verdict. *Deck v. Shields*, 195 Ga. 697, 25 S.E.2d 514 (1943).

**Statute of limitations.** — This statute excepts an attack on a void judgment from the bar of the statute of limitation. *Watson v. Watson*, 235 Ga. 136, 218 S.E.2d 863 (1975).

Statutes of limitation have no application to this class of judgments, and there can be no bar, estoppel, or limitation as to the time when a void judgment may be attacked. *Wasden v. Rusco Indus., Inc.*, 233 Ga. 439, 211 S.E.2d 733 (1975), overruled on other grounds, *Murphy v. Murphy*, 263 Ga. 280, 430 S.E.2d 749 (1993).

**Section refers to judgments void on their face.** — It is the accepted rule that a domestic judgment cannot be called into question in a collateral proceeding, except for defects apparent on the face of the record such as would render the proceedings void. *Owenby v. Stancil*, 190 Ga. 50, 8 S.E.2d 7 (1940).

**Judgment taken against the state without the state's consent is a nullity** since the state as sovereign cannot be sued without the state's consent. *Thompson v. Continental Gin Co.*, 73 Ga. App. 694, 37 S.E.2d 819 (1946).

**Judicial review of General Assembly's internal procedures.** — If in the exercise of its power to enact laws, the General Assembly fails to observe certain rules of internal procedure, the judiciary would not be authorized to review such action, and the same would be true as to any action of the officers of that body within the sphere of their jurisdiction. *Thompson v. Talmadge*, 201 Ga. 867, 41 S.E.2d 883 (1947).

**Void judgment may be attacked at any time.** — If the judgment or record showed that the court rendering the judgment did not have jurisdiction of the subject matter, any person whose rights would be affected could, at any time, make the objection. *Hackenhull v. Westbrook*, 53 Ga. 285 (1874); *Jones v. Jones*, 181 Ga. 747, 184 S.E. 271 (1936); *Drake v. Drake*, 187 Ga. 423, 1 S.E.2d 573 (1939); *Morrison v. Morrison*, 212 Ga. 48, 90 S.E.2d 402 (1955).

Void judgment may be attacked at any time and anywhere because the judgment is absolutely void. Even when the issue is not raised by counsel in the trial court and is raised for the first time in the petition for certiorari to the superior court, if the judgment shows on the judgment's face that the judgment is void, the judgment may be attacked. *Parker v. Bond*, 47 Ga. App. 318, 170 S.E. 331 (1933).

It is not necessary to take any steps to have a void judgment reversed, vacated, or set aside. But whenever it is brought up against the party, that party may assail its pretensions and show its worthlessness. It is supported by no presumptions, and may be impeached in any action, direct or collateral. *Shotkin v. State*, 73 Ga. App. 136, 35 S.E.2d 556 (1945), cert. denied, 329 U.S. 740, 67 S. Ct. 56, 91 L. Ed. 638 (1946).

Failure to traverse the entry of service or to plead to the jurisdiction will not preclude the defendant from seeking, in an equitable action, to have the judgment set aside when the record shows on the



**General Consideration (Cont'd)**

record's face that the court was without jurisdiction of the person of the defendant. *Ivey v. State Mut. Ins. Co.*, 200 Ga. 835, 38 S.E.2d 601 (1946).

**Void judgments may be disregarded.** *Blood v. Earnest*, 217 Ga. 642, 123 S.E.2d 913 (1962).

**Motion to set aside judgment not necessary prerequisite.** — It is not necessary that heirs at law who were not bound by the judgment of probate in solemn form first move to set aside the judgment in the court of ordinary (probate court) before resorting to equity to cancel a judgment alleged to be void. *Foster v. Foster*, 207 Ga. 519, 63 S.E.2d 318 (1951).

**Affidavit of illegality.** — Unless a judgment is void, an affidavit of illegality is never the proper method to attack the judgment. *Ayers v. Baker*, 216 Ga. 132, 114 S.E.2d 847 (1960).

**Pleading meritorious defenses.** — In equitable proceedings to set aside a judgment rendered in a court of law on account of accident, mistake, or fraud, the plaintiff is required to set out a meritorious defense to the action in which the plaintiff seeks to set aside the judgment. This does not mean that, in a direct equitable proceeding to set aside a judgment of a court of ordinary (now probate court) or a court of law on the ground that such court or courts had no jurisdiction of the subject-matter or of the person, and that the judgment is void, it is necessary to plead a meritorious defense. *Foster v. Foster*, 207 Ga. 519, 63 S.E.2d 318 (1951).

**Reversal on reviewing court's own motion.** — When the Court of Appeals discovers from the record that a judgment brought for review is void for any reason, it will of its own motion reverse it. *Troup County Bd. of Comm'rs v. Public Fin. Corp.*, 109 Ga. App. 547, 136 S.E.2d 509 (1964).

**Proper judgment not subject to attack.** — While the judgment of a court having no jurisdiction of the person against whom the judgment is rendered may be void, when the court has jurisdiction of the subject matter and the defendant has been served, the defendant cannot attack the judgment by affidavit of

illegality. *Hamilton v. Chitwood*, 37 Ga. App. 393, 140 S.E. 518 (1927).

When the court has jurisdiction of the subject-matter and the defendant has been served, the defendant cannot attack the judgment by affidavit of illegality. *Mason v. Stevens Whse. Co.*, 43 Ga. App. 375, 158 S.E. 631 (1931).

Contemner may not collaterally attack the judgment of a court in the main case in connection with which the contemner is cited for contempt, when the court has jurisdiction of the person and the subject matter of the main case. But this rule does not apply if the record in the main case shows on the record's face that the court does not have jurisdiction. *Bradley v. Simpson*, 59 Ga. App. 844, 2 S.E.2d 238, rev'd on other grounds, *Simpson v. Bradley*, 189 Ga. 316, 5 S.E.2d 893 (1939), cert. denied, 310 U.S. 643, 60 S. Ct. 1105, 84 L. Ed. 1410 (1940).

Trial court properly dismissed a business' contribution action, filed pursuant to O.C.G.A. § 51-12-32, on subject matter jurisdiction grounds as: (1) the court's finding that the business was the sole tortfeasor barred the action; (2) that finding was not void; (3) no appeal was taken from that finding; and (4) the suit amounted to an improper collateral attack on the default judgment entered against the business. *State Auto Mut. Ins. Co. v. Relocation & Corporate Hous. Servs.*, 287 Ga. App. 575, 651 S.E.2d 829 (2007), cert. denied, 2008 Ga. LEXIS 163 (Ga. 2008).

**Void judgment not basis for res judicata or estoppel.** — Judgment void for want of jurisdiction does not afford any ground for applying res judicata or estoppel. *Wilbanks v. Bowman*, 212 Ga. 809, 96 S.E.2d 255 (1957).

**When claimant waited unreasonable time to contest.** — Contention that a judgment was erroneous because the claimant waited an unreasonable length of time to contest the judgment's validity does not constitute an attack upon the jurisdiction of the superior court either as to the person or the subject matter, and accordingly the judgment of the superior court is a valid and binding judgment, never having been set aside or reversed. *Bentley v. Buice*, 102 Ga. App. 101, 115 S.E.2d 706 (1960).



**Want of service.** — Any judgment of any sort by counsel or by the court may be attacked if the judgment is void for want of service and of jurisdiction, which depends on service, as to the person. *McBride v. Bryan*, 67 Ga. 584 (1881); *Wade v. Watson*, 133 Ga. 608, 66 S.E. 922 (1909); *Strickland v. Willingham*, 49 Ga. App. 355, 175 S.E. 605 (1934); *Winn v. Armour & Co.*, 184 Ga. 769, 193 S.E. 447 (1937); *Cherry v. McCutchen*, 68 Ga. App. 682, 23 S.E.2d 587 (1942); *Abner v. Weeks*, 91 Ga. App. 682, 86 S.E.2d 727 (1955); *Dunn v. Dunn*, 221 Ga. 368, 144 S.E.2d 758 (1965); *Holloway v. Frey*, 130 Ga. App. 224, 202 S.E.2d 845 (1973); *Henry v. Hiwassee Land Co.*, 246 Ga. 87, 269 S.E.2d 2 (1980).

When there is no valid service or any waiver of such service, the trial court has no jurisdiction over a person, and the court's judgment is a nullity. *Gaddis v. Dyer Lumber Co.*, 168 Ga. App. 334, 308 S.E.2d 852 (1983).

**Judgment binding until set aside.** — When the record shows an entry of service by the sheriff, the judgment is binding until such entry is traversed and set aside. *Winn v. Armour & Co.*, 184 Ga. 769, 193 S.E. 447 (1937).

Judgment of a court having jurisdiction of both the parties and the subject matter, however irregular or erroneous, is binding until set aside. *Bentley v. Buice*, 102 Ga. App. 101, 115 S.E.2d 706 (1960).

**Invalidity establishable by showing deficiency in service of process.** — Once it becomes established that service is in fact deficient because the copy of process left with the defendant in a civil action is not dated or signed by the officer serving the process, the judgment is void, but, until such facts have been established, the judgment is not void in the sense and under the definition of void judgments contained in subsection (a) of Ga. L. 1967, p. 226, §§ 26, 27, and 30 (see now O.C.G.A. § 9-11-60). *Jennings v. Davis*, 92 Ga. App. 265, 88 S.E.2d 544 (1955).

**Suspending or vacating judgment merely to let in defense.** — When a party has been afforded an opportunity to be heard, the court cannot suspend or vacate the court's judgment merely to let in a defense which should have been of-

fered before the judgment was entered. *Buchanan v. Treadwell*, 213 Ga. 154, 97 S.E.2d 705 (1957).

**Judgment obtained by fraud void.** — Since a judgment obtained by fraud is void, such a judgment will be open to attack, whenever and wherever the judgment may come in conflict with the rights or interests of third persons who are not subject to estoppel. *Crawford v. Williams*, 149 Ga. 126, 99 S.E. 378 (1919).

Superior court may set aside as void the judgment of a court of ordinary (now probate court) when an allegation of fact in a petition to the court, which was necessary to give the court jurisdiction, was known by the petitioner to be false, and therefore was a fraud upon the court. *Henderson v. Hale*, 209 Ga. 307, 71 S.E.2d 622 (1952).

### Jurisdiction

**Lack of jurisdiction always avoids judgment.** — Lack of jurisdiction or power in a court entering a judgment always avoids the judgment, especially as the judgment relates to and affects the rights of other parties; such action is a usurpation of power by the court and may be declared void collaterally without any direct proceedings to revise the judgment. *Royal Indem. Co. v. Mayor of Savannah*, 209 Ga. 383, 73 S.E.2d 205 (1952); *Canal Ins. Co. v. Cambron*, 240 Ga. 708, 242 S.E.2d 32, cert. denied, 439 U.S. 805, 99 S. Ct. 61, 58 L. Ed. 2d 98 (1978).

**Effect of proceedings when court without jurisdiction.** — When judge's order shows on the order's face a total lack of jurisdiction, the judgment is wholly void and may be attacked collaterally. *Rogers v. Toccoa Power Co.*, 161 Ga. 524, 131 S.E. 517, 44 A.L.R. 534 (1926).

Proceedings in court when the court has no jurisdiction of the subject matter are nullities; and a judgment, after the case has been dismissed upon demurrer for lack of jurisdiction of the subject matter, awarding compensation to receivers and their attorneys, is null and void. *Deans v. Deans*, 164 Ga. 162, 137 S.E. 829 (1927).

Judgment of a court without jurisdiction of the parties is void and may be attacked at any time and in any court where such judgment is attempted to be enforced. *Jones v. Jones*, 181 Ga. 747, 184



**Jurisdiction (Cont'd)**

S.E. 271 (1936); *Hagan v. Hagan*, 209 Ga. 313, 72 S.E.2d 295 (1952).

Judgment of a court without jurisdiction of the subject matter or of the parties, or which is otherwise beyond the power and authority of the court to render in the particular case, is void. *Allen v. Baker*, 188 Ga. 696, 4 S.E.2d 642 (1939); *Williams v. Fuller*, 244 Ga. 846, 262 S.E.2d 135 (1979).

When the court rendering judgment had no jurisdiction or power to give it any retroactive effect, its action in attempting to do so was a nullity; and such action, being therefore void, is subject to collateral attack by any one whose rights are affected thereby, whenever and wherever asserted. *Royal Indem. Co. v. Mayor of Savannah*, 209 Ga. 383, 73 S.E.2d 205 (1952).

When allegations show that the judgment under attack is void, it is "sufficient cause" for relief in a court of equity. *Nuckolls v. Merritt*, 216 Ga. 35, 114 S.E.2d 427 (1960).

Judgment founded upon a suit in a court which had no jurisdiction of the person of the defendant is void, unless the defendant waived jurisdiction or appeared and pled to the merits. *Roland v. Shelton*, 106 Ga. App. 581, 127 S.E.2d 497 (1962).

Judgments and decrees void for want of the court's jurisdiction to render them may be set aside at any time after rendition thereof. *Baker v. Baker*, 221 Ga. 332, 144 S.E.2d 529 (1965).

**Judgment in personam rendered without notice.** — Judgment in personam, rendered against a defendant without notice to the defendant or an appearance by the defendant, is without jurisdiction and is entirely void. *Weaver v. Webb, Galt & Kellogg*, 3 Ga. App. 726, 60 S.E. 367 (1980); *Strickland v. Willingham*, 49 Ga. App. 355, 175 S.E. 605 (1934).

**Court's duty to ascertain jurisdiction.** — It is the duty of any judicial tribunal to first ascertain whether or not the tribunal has jurisdiction of the parties and subject matter involved in the controversy, and a court which has general jurisdiction over the subject matter involved will be presumed, when the judgment is

regular on the judgment's face, not to have exceeded the judgment's jurisdiction. *Churchwell Bros. Constr. Co. v. Archie R. Briggs Constr. Co.*, 89 Ga. App. 550, 80 S.E.2d 212 (1954).

It is the duty of the court, when apprised that the court has no jurisdiction, to dismiss the case at any stage of the proceeding, with or without motion therefor. *Griffis v. Griffis*, 229 Ga. 587, 193 S.E.2d 620 (1972).

It is the duty of a court to inquire into the court's jurisdiction, upon the court's own motion when there is doubt. *Culwell v. Lomas & Nettleton Co.*, 145 Ga. App. 519, 244 S.E.2d 61, rev'd on other grounds, 242 Ga. 242, 248 S.E.2d 641 (1978).

**Presumption as to finding of jurisdiction.** — When the question as to the jurisdiction of the court depends upon the existence or nonexistence of a fact, and the judgment is otherwise regular, and the court otherwise a court of competent jurisdiction, it is to be presumed that the court found facts to exist such as warranted the court assuming jurisdiction, and such finding of fact cannot be collaterally attacked. *Churchwell Bros. Constr. Co. v. Archie R. Briggs Constr. Co.*, 89 Ga. App. 550, 80 S.E.2d 212 (1954).

**Res judicata.** — Trial court erred in granting a limited liability company summary judgment in the company's ejectment action against a property owner on the ground of res judicata under O.C.G.A. § 9-12-40 because there remained a question of fact regarding whether the owner was a party to the prior action; the owner asserted and presented affidavit evidence supporting the claim that the trial court in the quiet title action lacked personal jurisdiction over the owner, thus creating a genuine issue of material fact regarding whether the owner was a party to the earlier litigation. *James v. Intown Ventures, LLC*, 290 Ga. 813, 725 S.E.2d 213 (2012).

**In personam jurisdiction not present after service by publication.** — There is no provision whereby courts may acquire jurisdiction over a defendant through service by publication and then render an in personam judgment against the defendant. *Tapley v. Proctor*, 150 Ga. App. 337, 258 S.E.2d 25 (1979).



In order for the court to bind nonresidents by the court's judgments in personam there must be personal service or waiver of personal service upon such nonresidents. This requirement has not been changed by the enactment of Ga. L. 1972, p. 689, §§ 1-3 (see now O.C.G.A. § 9-11-4). *Tapley v. Proctor*, 150 Ga. App. 337, 258 S.E.2d 25 (1979).

**Effect of jurisdiction appearing on face of proceedings.** — Whenever jurisdiction appears on the face of the proceedings upon which the judgment is rendered, everything will be intended in favor of the judgment; but when nothing appears on the face of the proceedings to give the court jurisdiction, as required by law, either of the subject-matter or the parties thereto, the whole proceeding is void. *Gray v. McNeal*, 12 Ga. 424 (1853).

**Effect of irregularities after jurisdiction has attached.** — When judgments may have been erroneous, but were not void and no exception to the judgments were taken, the judgments are binding on the parties. *Girardey v. Bessman*, 77 Ga. 483 (1886).

An irregular judgment is one that is entered contrary to the manner of practice and procedure allowed by law in some material respect; when jurisdiction is once attached, errors or irregularities in the proceedings, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void. *Rowell v. Rowell*, 214 Ga. 377, 105 S.E.2d 19 (1958).

When court judgment appointing an administrator for an incompetent's estate was not alleged to be void, the judgment could not be collaterally attacked by a motion to dismiss the writ of error pertaining to a denial of the motion for judgment notwithstanding verdict in a suit by a former ward challenging the disbursements of former guardian. *Weekes v. Fuller*, 218 Ga. 515, 128 S.E.2d 715 (1962).

**Cited in** *Jowers & Son v. Kirkpatrick Hdwe. Co.*, 21 Ga. App. 751, 94 S.E. 1044 (1918); *Wadley S. Ry. v. Wright*, 31 Ga. App. 289, 120 S.E. 551 (1923); *Walker v. Hall*, 176 Ga. 12, 166 S.E. 757 (1932); *Gray v. Riley*, 47 Ga. App. 348, 170 S.E.

537 (1933); *Shiflett v. Dobson*, 180 Ga. 23, 177 S.E. 681 (1934); *Nixon v. L.A. Russell Piano Co.*, 51 Ga. App. 399, 180 S.E. 743 (1935); *Walker v. Walker*, 53 Ga. App. 769, 187 S.E. 164 (1936); *Kerr v. McAnally*, 183 Ga. 365, 188 S.E. 687 (1936); *Hunter v. Associated Mtg. Cos.*, 183 Ga. 506, 188 S.E. 700 (1936); *Gullatt v. Slaton*, 189 Ga. 758, 8 S.E.2d 47 (1940); *Durden v. Durden*, 191 Ga. 404, 12 S.E.2d 305 (1940); *Langston v. Nash*, 192 Ga. 427, 15 S.E.2d 481 (1941); *Head v. Waldrup*, 193 Ga. 165, 17 S.E.2d 585 (1941); *Harrison v. Tonge*, 67 Ga. App. 54, 19 S.E.2d 535 (1942); *Hardison v. Gledhill*, 72 Ga. App. 432, 33 S.E.2d 921 (1945); *Hall v. Hall*, 203 Ga. 656, 47 S.E.2d 806 (1948); *Gaither v. Gaither*, 205 Ga. 572, 54 S.E.2d 600 (1949); *Chambers v. Chambers*, 206 Ga. 796, 58 S.E.2d 814 (1950); *Powell v. Powell*, 207 Ga. 1, 59 S.E.2d 718 (1950); *Lott v. Lott*, 207 Ga. 34, 59 S.E.2d 912 (1950); *Jue v. Joe*, 207 Ga. 119, 60 S.E.2d 442 (1950); *Ivy v. Ferguson*, 82 Ga. App. 600, 62 S.E.2d 191 (1950); *Georgia R.R. & Banking v. Redwine*, 208 Ga. 261, 66 S.E.2d 234 (1951); *Porter v. Employers Liab. Ins. Co.*, 85 Ga. App. 497, 69 S.E.2d 384 (1952); *Lockhart v. Lockhart*, 211 Ga. 482, 86 S.E.2d 297 (1955); *Cocke v. Truslow*, 91 Ga. App. 645, 86 S.E.2d 686 (1955); *Trowbridge v. Dominy*, 92 Ga. App. 177, 88 S.E.2d 161 (1955); *Eagan v. First Nat'l Bank*, 212 Ga. 212, 91 S.E.2d 499 (1956); *Buchanan v. Treadwell*, 213 Ga. 154, 97 S.E.2d 705 (1957); *Farmer v. Whitehead*, 95 Ga. App. 520, 98 S.E.2d 145 (1957); *Musgrove v. Musgrove*, 213 Ga. 610, 100 S.E.2d 577 (1957); *Thompson v. Central of Ga. Ry.*, 98 Ga. App. 228, 105 S.E.2d 508 (1958); *Dupree v. Turner*, 99 Ga. App. 332, 108 S.E.2d 171 (1959); *Curtis v. Curtis*, 215 Ga. 367, 110 S.E.2d 668 (1959); *New Amsterdam Cas. Co. v. Thompson*, 100 Ga. App. 677, 112 S.E.2d 273 (1959); *Nuckolls v. Merritt*, 216 Ga. 35, 114 S.E.2d 427 (1960); *Brewton v. McLeod*, 216 Ga. 686, 119 S.E.2d 105 (1961); *Waldor v. Waldor*, 217 Ga. 496, 123 S.E.2d 660 (1962); *Allen v. Allen*, 218 Ga. 364, 127 S.E.2d 902 (1962); *Saborit v. Welch*, 108 Ga. App. 611, 133 S.E.2d 921 (1963); *Trammell v. Trammell*, 220 Ga. 293, 138 S.E.2d 562 (1964); *U.S. Fid. & Guar. Co. v. Dunbar*, 112 Ga. App. 102, 143



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S.E.2d 663 (1965); *Edwards v. Lampkin*, 112 Ga. App. 128, 144 S.E.2d 119 (1965); *Ferguson v. Hunt*, 221 Ga. 728, 146 S.E.2d 756 (1966); *Armstrong Cork Co. v. Joiner*, 221 Ga. 789, 147 S.E.2d 317 (1966); *Frady v. Frady*, 222 Ga. 184, 149 S.E.2d 324 (1966); *Byrd v. Byrd*, 223 Ga. 24, 153 S.E.2d 422 (1967); *International Ladies Garment Workers Union v. Smith*, 223 Ga. 459, 156 S.E.2d 71 (1967); *Corder v. Fulton Nat'l Bank*, 223 Ga. 524, 156 S.E.2d 452 (1967); *Byrd v. Moore Ford Co.*, 116 Ga. App. 292, 157 S.E.2d 41 (1967); *Funderburg v. Wold*, 117 Ga. App. 638, 161 S.E.2d 376 (1968); *Burson v. Bishop*, 117 Ga. App. 602, 161 S.E.2d 518 (1968); *Orange County Trust Co. v. Takowsky*, 119 Ga. App. 366, 166 S.E.2d 913 (1969); *Kazakos v. Soteres*, 120 Ga. App. 258, 170 S.E.2d 50 (1969); *Sutton v. Hutchinson*, 226 Ga. 99, 172 S.E.2d 663 (1970); *Berry v. Consumer Credit*, 124 Ga. App. 586, 184 S.E.2d 694 (1971); *Lowndes County v. Dasher*, 229 Ga. 289, 191 S.E.2d 82 (1972); *Aiken v. Bynum*, 128 Ga. App. 212, 196 S.E.2d 180 (1973); *First Fid. Ins. Corp. v. Busbia*, 128 Ga. App. 485, 197 S.E.2d 396 (1973); *Trapnell v. Smith*, 131 Ga. App. 254, 205 S.E.2d 875 (1974); *Adams Drive, Ltd. v. All-Rite Trades, Inc.*, 136 Ga. App. 703, 222 S.E.2d 174 (1975); *Dennis v. McCrary*, 237 Ga. 605, 229 S.E.2d 367 (1976); *Thoni Oil Co. v. Tinsley*, 140 Ga. App. 887, 232 S.E.2d 162 (1977); *Jordan v. Ford Motor Credit Co.*, 141 Ga. App. 280, 233 S.E.2d 256 (1977); *Unigard Ins. Co. v. Kemp*, 141 Ga. App. 698, 234 S.E.2d 539 (1977); *Wilson v. Passmore*, 240 Ga. 716, 242 S.E.2d 124 (1978); *Webb v. National Disct. Co.*, 148 Ga. App. 313, 251 S.E.2d 163 (1978); *Safe-Lite Mfg., Inc. v. C.E. Morgan Bldg. Prods., Inc.*, 150 Ga. App. 172, 257 S.E.2d 19 (1979); *O'Neill v. Western Mtg. Corp.*, 153 Ga. App. 151, 264 S.E.2d 691 (1980); *Lovell v. Service Concept, Inc.*, 154 Ga. App. 760, 269 S.E.2d 894 (1980); *Medlin v. Church*, 157 Ga. App. 876, 278 S.E.2d 747 (1981); *Albitus v. F & M Bank*, 159 Ga. App. 406, 283 S.E.2d 632 (1981); *Brant v. Bazemore*, 159 Ga. App. 659, 284 S.E.2d 674 (1981); *Anderson v. King*, 160 Ga. App. 802, 288 S.E.2d 231 (1982); *McDonnell v. Episcopal Diocese*,

191 Ga. App. 174, 381 S.E.2d 126 (1989); *King Cotton, Ltd. v. Powers*, 200 Ga. App. 549, 409 S.E.2d 67 (1991); *Lewis v. Jarvis*, 207 Ga. App. 246, 427 S.E.2d 596 (1993); *Georgia Ports Auth. v. Hutchinson*, 209 Ga. App. 726, 434 S.E.2d 791 (1993).

**Specific Application****1. In General**

**Compliance with former Code 1933, §§ 81-206 to 81-208** was necessary to give the court in which the divorce proceeding was filed jurisdiction of the case. If, without so complying, the plaintiff proceeded to try the case and the court entered a decree, "such a decree was void, and at the suit of the defendant upon whom service had not been perfected, to have the decree declared void, the decree should be set aside." *Homburger v. Homburger*, 213 Ga. 344, 99 S.E.2d 213 (1957).

**Direct proceeding to set aside probate in solemn form.** — Court of equity may entertain a direct proceeding to set aside a probate in solemn form when it is alleged that certain heirs at law of the testatrix, residents of the state wherein the will was probated, were not served with personal notice of the probate proceedings, did not waive service, and had no knowledge of such proceedings, and it is alleged that the judgment probating the will in solemn form is, as to them, a nullity. *Foster v. Foster*, 207 Ga. 519, 63 S.E.2d 318 (1951).

**Service upon a minority of a church membership** is not such service as will bind church property under a judgment against certain individuals who are members of the church. *Walker v. Ful-Kalb, Inc.*, 181 Ga. 563, 183 S.E. 776 (1935).

**Service attempted in county other than county of origin.** — Judgment is absolutely void when it appears from the face of the record that suit was instituted in the county of the residence of the endorser of a promissory note, and service upon the maker of the note was attempted by service of a second original in another county. *Ivey v. State Mut. Ins. Co.*, 200 Ga. 835, 38 S.E.2d 601 (1946).

**Judgment of another state without jurisdiction** may be collaterally at-



tacked. *Morrison v. Morrison*, 212 Ga. 48, 90 S.E.2d 402 (1955).

**Judgment against foreign citizen.**

— Courts of this state have no jurisdiction to render a valid judgment against a citizen of another state in a common law action, unless the citizen has been within the limits of this state, and has been served with process while in this state. *Howell v. Gordon*, 40 Ga. 302 (1869).

**Judgment against a lunatic** is not void, but voidable. *John Doe v. Roe*, 23 Ga. 168 (1857).

**Judgment upon sane person later declared insane.** After the defendant was duly served in person with a copy of the petition and process at a time when the defendant was sane, a default judgment thereafter rendered against the defendant was not void because in the meantime the defendant was adjudged to be a lunatic and committed, and was not represented in such suit by a guardian or guardian ad litem. *Burkhalter v. Virginia-Carolina Chem. Co.*, 42 Ga. App. 312, 156 S.E. 272 (1930).

**Persons non compos mentis.** — When a non compos mentis person was sued upon what purported to be a contractual obligation entered into by that person, and was served only by the leaving of a copy of the petition and process at the person's residence, and was not represented in the suit by any guardian or other person appointed to look after the person's interests, a judgment rendered against the person in the suit was capable in a proper proceeding brought in the person's behalf of being set aside as invalid. *Perry v. Fletcher*, 46 Ga. App. 450, 167 S.E. 796 (1933).

An insane person may, after time for excepting to the judgment has expired, institute, by next friend, in the court in which the judgment was rendered, proceedings in the nature of a motion to set aside the judgment as being void. *Perry v. Fletcher*, 46 Ga. App. 450, 167 S.E. 796 (1933).

When no notice was given to the plaintiff in the lunacy proceeding and the court of ordinary (now probate court) did not have personal jurisdiction of the plaintiff, the appointment of a guardian is subject to attack by the plaintiff that the appoint-

ment was a nullity and void. *Tucker v. Tucker*, 221 Ga. 128, 143 S.E.2d 639 (1965).

**When invalidity not shown on face of record.** — Invalidity of a judgment which is invalid because of irregularities in the copy of process served on the defendant not appearing on the face of the record when a proper entry of service, complete and regular on its face, is made on the original process filed in the office of the clerk, then establishment of its invalidity becomes a question of fact which can be raised only by a traverse to the return of the officer, and until this is done, such a judgment is not void under the definition of void judgments. *Jennings v. Davis*, 92 Ga. App. 265, 88 S.E.2d 544 (1955).

**When judge exceeds jurisdiction.** — Judgment of a judge who exceeds the judge's jurisdiction as a whole will be void and a mere nullity. *Cornett v. Ault*, 124 Ga. 944, 53 S.E. 460 (1906).

Trial court's order denying the defendant's extraordinary motion for new trial/habeas petition was a nullity and void under O.C.G.A. § 9-12-16, and the appellate court could not transfer the defendant's case to the Georgia Supreme Court to consider the grant of a certificate of probable cause under O.C.G.A. § 9-14-52(b), even though the Georgia Supreme Court had exclusive jurisdiction over habeas cases, as the trial court was without subject matter jurisdiction to entertain the defendant's habeas claim upon a transfer from a habeas court with instructions to determine whether trial counsel was ineffective; however, as defendant's habeas claims had not been addressed by a court of competent jurisdiction, the appellate court remanded the matter to the habeas court for resolution of the defendant's habeas claims of ineffective assistance of counsel, with the final order subject to the appellate procedures outlined in § 9-14-52. *Herrington v. State*, 265 Ga. App. 454, 594 S.E.2d 682 (2004).

**Justice of the peace cannot set aside own judgment.** — Justice of the peace has no authority to set aside a judgment rendered by the justice of the peace. The subsequent entering of a second judgment purporting to set aside the first mentioned judgment is itself void and



**Specific Application (Cont'd)****1. In General (Cont'd)**

should be treated as a nullity. *Edwards & Daniel v. Edwards*, 163 Ga. 825, 137 S.E. 244 (1927).

**Attacking judgment as void in attachment case.** — It is claimant's right to attack as void a judgment rendered in an attachment case by showing that there has never been a legal levy of the attachment itself. *New England Mtg. Sec. Co. v. Watson*, 99 Ga. 733, 27 S.E. 160 (1896).

**Garnishment affidavit not reciting jurisdictional fact** renders judgment void. *National Lumber Co. v. Turner*, 2 Ga. App. 750, 59 S.E. 15 (1907).

**Homestead granted without notice to creditor.** — In the court of ordinary (now probate court), a homestead granted without notice to a certain creditor, is a nullity as to that creditor. *Weekes & Son v. Edwards*, 101 Ga. 314, 28 S.E. 853 (1897).

**Fact that an execution was issued on a void judgment** and levied does not give vitality to the judgment. *Jowers & Son v. Kirkpatrick Hdwe. Co.*, 21 Ga. App. 751, 94 S.E. 1044 (1918).

**Void reinstatement of case.** — Consent of counsel in vacation to reinstatement of a cause which has been dismissed in term time will not serve to confer jurisdiction upon the court, nor vitalize a judgment rendered after such void reinstatement, and which for that very reason is void. *Owens v. Cocroft*, 14 Ga. App. 322, 80 S.E. 906 (1914).

**Judgment and appointment of a guardian was a nullity** when the record shows the applicants in a proceeding involving the validity of a will attempted to waive the ten day notice and the court proceeded to declare the testatrix incompetent and appointed a guardian for the testatrix in two days without complying with the law. *English v. Shivers*, 220 Ga. 737, 141 S.E.2d 443 (1965).

**Discharge obtained by an executor by means of fraud** practiced upon the legatees or the ordinary (now probate judge) is void. *Pass v. Pass*, 98 Ga. 791, 25 S.E. 752 (1896).

**Grant of letters of administration is not void when** there is a will on file at the time of the grant in the office of the

ordinary (now probate judge) which is subsequently admitted to probate. *Smith v. Scarborough*, 182 Ga. 157, 185 S.E. 105 (1936).

**Judgment appointing a person administrator de bonis non.** — When citation has not issued and been advertised, the judgment appointing a person administrator de bonis non is a nullity, and can be collaterally attacked in any proceeding in which the judgment or letters of administration issued thereon are relied upon as establishing the legal appointment of an administrator, when this affirmatively appears from the record introduced to establish the appointment. *Davis v. Melton*, 51 Ga. App. 685, 181 S.E. 300 (1935).

**Jurisdiction for challenge to municipal charter law.** — Municipal courts have no jurisdiction of prosecution for violation of state statute setting forth charter of municipality. Sentence imposed by a municipal court for violation of such statute is void and subject to collateral attack. *Rose v. Mayor of Thunderbolt*, 89 Ga. App. 599, 80 S.E.2d 725 (1954).

**County board of commissioner's order void.** — Settlement agreement entered into by a county and the county's board of commissioners was void as an ultra vires act because the agreement purported to forever bind the hands of future boards of commissioners regarding land use and zoning decisions for certain property in violation of O.C.G.A. § 36-30-3(a) and a trial court therefore had jurisdiction to nullify the agreement at any time. *Buckhorn Ventures, LLC v. Forsyth County*, 262 Ga. App. 299, 585 S.E.2d 229 (2003).

**Effect of invoking arbitration.** — Fact that a taxpayer who objected to an assessment invoked arbitration would not estop the taxpayer from attacking an award in equity as void. *Montgomery v. Suttles*, 191 Ga. 781, 13 S.E.2d 781 (1941).

**Party absent due to illness but represented by counsel.** — When a party receives notice of a trial or hearing, and an attorney appears for the party and participates therein, and a judgment is rendered against the party, the fact that the court or forum had notice of the party's sickness will not render the judgment



void, and as such subject to attack under this section; it is the duty of such party to “follow up” on the party’s case and by proper procedure to attack the judgment upon some meritorious showing that, although represented by the attorney, the party’s absence prejudiced some substantial right or prevented the party from testifying upon some matter vital to the party’s right of recovery or defense, or in any event, not to ignore the adverse judgment by failing to appeal or take a writ of error to the proper court. *Thomas v. Travelers Ins. Co.*, 53 Ga. App. 404, 185 S.E. 922 (1936).

**Foreclosure judgment as to car.** — Failure to provide a corporation that was the original owner of a car with notice of a foreclosure proceeding involving the car was a due process violation that was tantamount to a lack of personal jurisdiction; thus, the foreclosure judgment was void under O.C.G.A. § 9-12-16. *Mitsubishi Motors Credit of Am., Inc. v. Sheridan*, 286 Ga. App. 791, 650 S.E.2d 357 (2007), cert. denied, No. S07C1842, 2007 Ga. LEXIS 751 (Ga. 2007).

**Judgment of judge appointed to fill vacancy not void.** — Judgment entered by a judge, who was appointed by the chief county magistrate judge upon a request for “assistance” made by the superior court chief judge pursuant to O.C.G.A. § 15-1-9.1, was not void, even though the judge was appointed to fill a vacancy created by the resignation of a superior court judge, which vacancy should have been filled by the governor. *Dominguez v. Enterprise Leasing Co.*, 197 Ga. App. 664, 399 S.E.2d 269 (1990).

**Section inapplicable when judgment at issue was not a void judgment.** — Trial court properly denied a motion to correct a judgment entered against two debtors and their guarantors, five years and eight months after the expiration of the term of court in which the judgment was entered, as they failed to show any entitlement to relief or exception as to why they could not have timely sought the relief requested, and O.C.G.A. § 9-12-16 did not apply because there was no issue regarding the trial court’s original jurisdiction and because the judgment at issue was not a void judgment. *De La*

*Reza v. Osprey Capital, LLC*, 287 Ga. App. 196, 651 S.E.2d 97 (2007), cert. denied, No. S07C1928, 2007 Ga. LEXIS 819 (Ga. 2007).

**Trial court erred in setting aside consent decree.** — Trial court erred in finding that a consent judgment was void due to impossibility of performance or lack of mutuality and in denying the sellers’ motion for judgment instanter on the consent judgment because the purchasers accepted the risk that the purchasers would be unable to complete the road on time per the agreement and set up an alternative method of compliance, namely, the payment of money to the sellers. *Kothari v. Tessfaye*, 318 Ga. App. 289, 733 S.E.2d 815 (2012).

## 2. Domestic Issues

**Void judgment no defense to enforcement of valid judgment of alimony.** — Judgment which purported to modify permanent alimony judgment but which was void for want of power or jurisdiction in the court to grant the judgment, constituted no defense to the plaintiff’s action to collect the amount awarded for the support of the child in the original proceeding, payment of which had not been made and was in arrears at the time the suit was filed. *Buxton v. Hooker*, 214 Ga. 271, 104 S.E.2d 437 (1958).

**Want of jurisdiction of party in divorce case.** — Judgment granting to the wife a divorce and permanent alimony was not void either because she resumed cohabitation with her husband after the suit was filed, or because of the fact that pending the action she made an agreement with her husband, which she did not disclose in court, to the effect that she would not claim alimony (which facts, so far as they may have furnished any grounds of defense, should have been urged before judgment, or in a proper proceeding to set it aside) and the court did not err in excluding evidence of such facts in a contempt proceeding brought against the husband for his failure to pay alimony as required by the decree. *Rozetta v. Rozetta*, 181 Ga. 494, 182 S.E. 847 (1935).

While the power to enforce a decree for alimony by attachment for contempt by



**Specific Application (Cont'd)****2. Domestic Issues (Cont'd)**

judges of the superior courts is still adequate, if in such a proceeding it appears that the judgment awarding alimony is void, for any reason, the husband is privileged to collaterally attack the judgment, and in such case the court has no power to punish him for contempt. *Allen v. Baker*, 188 Ga. 696, 4 S.E.2d 642 (1939).

In an original suit in equity for a decree declaring void and of no effect verdicts and decree in a divorce suit, on grounds that the court was without jurisdiction of the case, because at the time of filing of the suit for divorce the defendant was a resident of Clayton County, whereas the suit was brought in Fulton County, the alleged want of jurisdiction was a sufficient ground of attack upon the verdicts and decree of divorce. *Haygood v. Haygood*, 190 Ga. 445, 9 S.E.2d 834 (1940).

Award of temporary alimony by a court not having jurisdiction of the parties cannot be the basis of a valid proceeding for contempt. *Hagan v. Hagan*, 209 Ga. 313, 72 S.E.2d 295 (1952).

Since no valid judgment can be rendered in a divorce case if the court is without jurisdiction, it is the duty of the court, when apprised of the fact that the

court has no jurisdiction, to dismiss the case at any stage of the proceeding, with or without motion therefor. *Cohen v. Cohen*, 209 Ga. 459, 74 S.E.2d 95 (1953).

When it appears upon the face of the record that the court was without jurisdiction of a divorce case the judgment was void ab initio; and being void the defendant would not be guilty of contempt of court for failing to pay alimony awarded by that judgment. *Johnson v. Johnson*, 222 Ga. 433, 150 S.E.2d 684 (1966).

**Consequence of failing to take exception to decree.** — When decree awarding permanent alimony for support of a minor child was based on the verdict which a jury rendered in a divorce and alimony suit and was not excepted to, it therefore became absolute and the court is without power or jurisdiction to modify the decree's terms, even with the consent of the child's parents. *Buxton v. Hooker*, 214 Ga. 271, 104 S.E.2d 437 (1958).

**Notice to minor children in support action.** — To arbitrarily discriminate against the child or children, and set apart for the widow alone the entire net proceeds of an insolvent estate, and give the minor child no notice of such action, is so unreasonable and contrary to law as to void such judgment. *De Jarnette v. De Jarnette*, 176 Ga. 204, 167 S.E. 526 (1933).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 46 Am. Jur. 2d, Judgments, §§ 22 et seq., 29.

**C.J.S.** — 49 C.J.S., Judgments, § 22 et seq.

**ALR.** — Is service of notice or process in proceeding to vacate or modify judgment to be made upon owner of judgment or upon the attorney, 78 ALR 370.

Right to attack consent judgment or decree on ground that it was not within scope of pleadings or was beyond the jurisdiction of the court, 86 ALR 84.

Attack on judgment because of invalidity of contract on which it was rendered, 95 ALR 1267.

Nonparty who acquires interest in property pending action or after judgment as within benefit of statute or rule providing for opening, vacating, or setting aside of judgments, 104 ALR 697.

Mental incompetency at time of rendition of judgment in civil action as ground of attack upon it, 140 ALR 1336.

Lapse of time as bar to action or proceeding for relief in respect of void judgment, 154 ALR 818.

Extraterritorial effect of provision in decree of divorce as to custody of child, 160 ALR 400.

Remedy available against invalid judgment in favor of United States, state, or other governmental unit immune to suit, 163 ALR 244.

Constructive service of process in action against nonresident to set aside judgment, 163 ALR 504.

Foreign divorce decree as subject to attack by spouse in state of which neither spouse is resident, 12 ALR2d 382.

Setting aside default judgment for fail-



ure of statutory agent on whom process was served to notify defendant, 20 ALR2d 1179.

Collateral attack on domestic nunc pro tunc judgment, 70 ALR2d 1131.

Appealability of void judgment or of one granting or denying motion for vacation thereof, 81 ALR2d 537.

Who, other than natural or adopting parents, or heirs of latter, may collaterally attack adoption decree, 92 ALR2d 813.

Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor, 51 ALR5th 747.

## 9-12-17. When creditors or purchasers may attack judgment.

Creditors or bona fide purchasers may attack a judgment for any defect appearing on the face of the record or the pleadings or for fraud or collusion, whenever and wherever it interferes with their rights, either at law or in equity. (Orig. Code 1863, § 3515; Code 1868, § 3538; Code 1873, § 3596; Code 1882, § 3596; Civil Code 1895, § 5371; Civil Code 1910, § 5966; Code 1933, § 110-711.)

### JUDICIAL DECISIONS

**This section is not of statutory origin**, but is a codification of matters embraced within the general powers of a court of equity; the jurisdiction to which the statute specifically refers dates back long years before there ever was a Georgia Code. *Gentle v. Georgia Power Co.*, 179 Ga. 853, 177 S.E. 690 (1934).

**Verdicts covered by section.** — Although the word “verdicts” is not found in this section, it is not thereby to be regarded as excluded by implication; jurisdiction to relieve against verdicts inequitably obtained exists as certainly as it does against awards, judgments, and decrees obtained by imposition. *Gentle v. Georgia Power Co.*, 179 Ga. 853, 177 S.E. 690 (1934).

**Showing required when seeking equitable relief.** — One invoking equitable relief against verdicts, as well as against judgments, should meet the usual requirement as to showing that one’s relief at law would be less adequate than one’s relief at equity. *Gentle v. Georgia Power Co.*, 179 Ga. 853, 177 S.E. 690 (1934).

**Equity unavailable when remedy at law adequate.** — When a judgment at law is void for reasons appearing on the face of the record, and the remedy at law is adequate, complete, and available, equity will not afford relief. *Martocello v. Martocello*, 197 Ga. 629, 30 S.E.2d 108 (1944).

**Effect on purchaser of knowledge of lien on property.** — Purchaser who takes without notice of the judgment can attach as freely as a creditor. But one who purchases property which one knows to be subject to the lien of a judgment in the hands of one’s vendor, acquires the property as a privy in estate with the vendor, and it would be no hardship to hold the purchaser as much bound by the judgment as the purchaser would be were the purchaser a direct party to it. The general rule with reference to bona fide purchasers is that a want of notice is essential to their claim for protection. *Prendergast v. Wiseman*, 80 Ga. 419, 7 S.E. 228 (1888); *Carrollton Bank v. Wager*, 169 Ga. 304, 150 S.E. 146 (1929).

**Bona fide purchaser attacking writs fieri facias.** — Even if writs of fieri facias were good as between the parties thereto, one claiming to be a purchaser bona fide would not be bound by the judgment, but might attack the judgment under this section. *Strickland v. Griffin*, 70 Ga. 541 (1883).

**Attacking appointment of guardian.** — Invalidity of the appointment of a guardian appearing upon the face of the record, the judgment of appointment may be attacked collaterally. *Payne v. Shirley*, 25 Ga. App. 644, 104 S.E. 17 (1920).

**Collateral attack of unreversed**



**judgment of competent court.** — Unreversed judgment of competent court cannot be collaterally attacked except for causes provided for in this section. *Hammock v. McBride*, 6 Ga. 178 (1849); *McArthur & Griffin v. Matthewson & Butler*, 67 Ga. 134 (1881); *Smith v. Cuyler*, 78 Ga. 654, 3 S.E. 406 (1887); *William v. Lancaster*, 113 Ga. 1020, 39 S.E. 471 (1901); *Brooke v. F & M Bank*, 27 Ga. App. 250, 108 S.E. 135 (1921).

**When judgment subject to motion in arrest of judgment.** — On a motion in arrest of judgment, a petition, although defective and subject to general demurrer (now motion to dismiss), in that the petition omits to set forth all the necessary ingredients of a cause of action, will not render the judgment based thereon subject to the technical statutory remedy of this section, unless the petition affirmatively shows on its face that a cause of action did not in fact exist, or that the petition is so utterly defective that it could not be amended at all, or that the defect in the petition is of such character as renders unenforceable or meaningless the verdict and judgment based thereon. *Mell v. McNulty*, 185 Ga. 343, 195 S.E. 181 (1938); *Adams v. Morgan*, 114 Ga. App. 180, 150 S.E.2d 556, cert. dismissed, 222 Ga. 820, 152 S.E.2d 693 (1966).

**Direct attack on judgment restricted to real parties in interest.** — It is the general rule, save for certain exceptions in favor of creditors or bona fide purchasers and others who may be excepted by statute, that none but the parties to a judgment can move directly for the judgment's nullification, that a third person, not a party to the record, cannot go into court and move to set aside a judgment which is not against that third party. The underlying basis of this rule is that to permit third persons to become interested after judgment, and to overturn adjudications to which the original parties made no objection, would encourage litigation, and disturb the repose beneficial to society. *Thomas v. Lambert*, 187 Ga. 616, 1 S.E.2d 443 (1939), overruled on other grounds, *Canal Ins. Co. v. Cambron*, 240 Ga. 708, 242 S.E.2d 32 (1978).

**Real parties in interest rule applicable to divorce decrees.** — One who is

neither a party to a divorce decree nor is in any relation with either of the parties as to any right of property involved in or affected by the decree is not entitled to make a direct attack on the decree, either in the case itself or by an independent equity suit in the same court, when the decree is not void on the decree's face. *Thomas v. Lambert*, 187 Ga. 616, 1 S.E.2d 443 (1939), overruled on other grounds, *Canal Ins. Co. v. Cambron*, 240 Ga. 708, 242 S.E.2d 32 (1978).

**Attack on facially valid judgment by stranger.** — An attack on a judgment regular on the judgment's face must be taken as collateral when the petitioner, as a stranger to the previous record, claims to have become incidentally interested therein after a termination of that case. *Martocello v. Martocello*, 197 Ga. 629, 30 S.E.2d 108 (1944).

**Right of creditor to attack judgment of another creditor.** — Right of a creditor to attack the judgment of another creditor because of an alleged defect appearing on the face of the record or pleadings does not extend to irregularities previous to the judgment; the defects must be such as are not amendable. *Mell v. McNulty*, 185 Ga. 343, 195 S.E. 181 (1938); *Adams v. Morgan*, 114 Ga. App. 180, 150 S.E.2d 556, cert. dismissed, 222 Ga. 820, 152 S.E.2d 693 (1966).

**Unamendable defect is prerequisite to relief.** — Rule in this section is the same as that which controls on a motion in arrest or to set aside a judgment in that the defect must be one which was not amendable. *Mell v. McNulty*, 185 Ga. 343, 195 S.E. 181 (1938).

**Knowledge by creditor that debtor adjudicated insane.** — When the attorney for the plaintiff-creditor knew that the defendant had been judged insane at the time of obtaining the default judgment, this knowledge did not constitute such fraud or collusion as would open the judgment to collateral attack by another creditor in a proceeding in the nature of a money rule. *Burkhalter v. Virginia-Carolina Chem. Co.*, 42 Ga. App. 312, 156 S.E. 272 (1930).

**Attacking foreign judgment as procured by fraud.** — Judgment of a court of a foreign state having jurisdiction of the subject matter and the parties cannot be



collaterally attacked in the courts of this state on the ground of fraud. *Wood v. Wood*, 200 Ga. 796, 38 S.E.2d 545 (1946).

While a judgment procured by fraud may be set aside for the fraud in a direct proceeding, still, if the judgment is rendered by a court of competent jurisdiction, the parties are concluded by the judgment until the judgment is set aside. *Wood v. Wood*, 200 Ga. 796, 38 S.E.2d 545 (1946).

**Cited** in *Smith v. Gettinger*, 3 Ga. 140 (1847); *Hammock v. McBride*, 6 Ga. 178

(1849); *Williams v. Martin*, 7 Ga. 377 (1849); *Stanford & Golden v. Bradford*, 45 Ga. 97 (1872); *Lovelace v. Lovelace*, 179 Ga. 822, 177 S.E. 685 (1934); *Simpson v. Bradley*, 189 Ga. 316, 5 S.E.2d 893 (1939); *Boland v. Barge*, 108 Ga. App. 689, 134 S.E.2d 463 (1963); *Wasden v. Rusco Indus., Inc.*, 233 Ga. 439, 211 S.E.2d 733 (1975); *Simonds v. Simonds*, 145 Ga. App. 227, 243 S.E.2d 545 (1978); *Albitus v. F & M Bank*, 159 Ga. App. 406, 283 S.E.2d 632 (1981).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 77 Am. Jur. 2d, Vendor and Purchaser, § 412 et seq.

**C.J.S.** — 49 C.J.S., Judgments, § 393 et seq.

**ALR.** — Effect of reversal or vacation of judgment on execution sale, 29 ALR 1071.

Mental incompetency at the time of rendition of judgment in civil action as ground of attack upon it, 34 ALR 221; 140 ALR 1336.

Criterion of extrinsic fraud as distinguished from intrinsic fraud, as regards relief from judgment on ground of fraud, 88 ALR 1201.

Power of court to award alimony or property settlement in divorce suit as affected by failure of pleading or notice to make a claim therefor, 152 ALR 445.

## 9-12-18. Right to confess judgment and appeal; where and when entered.

(a) Either party has a right to confess judgment without the consent of his adversary and to appeal from such confession without reserving the right to do so in cases where an appeal is allowed by law.

(b) No confession of judgment shall be entered except in the county where the defendant resided at the commencement of the action unless expressly provided for by law. The action must have been regularly filed and docketed as in other cases. However, a judge of a superior court or a magistrate may confess judgment in his own court. (Laws 1799, Cobb's 1851 Digest, p. 495; Code 1863, §§ 3518, 3519, 3520; Code 1868, §§ 3541, 3542, 3543; Code 1873, §§ 3600, 3601, 3602; Code 1882, §§ 3600, 3601, 3602; Civil Code 1895, §§ 5359, 5360, 5361; Civil Code 1910, §§ 5954, 5955, 5956; Code 1933, §§ 110-601, 110-602, 110-603; Ga. L. 1983, p. 884, § 4-1.)

**Law reviews.** — For article comparing sections of the Georgia Civil Practice Act (Ch. 11 of this title) with preexisting provisions of the Georgia Code, see 3 Ga. St. B.J. 295 (1967).

For comment on *Cocke v. Truslow*, 91 Ga. App. 645, 86 S.E.2d 686 (1955), see 18 Ga. B.J. 92 (1955).



## JUDICIAL DECISIONS

**Same treatment as for judgments rendered on verdicts.** — This section recognizes that a judgment obtained by confession is to be entered up as in cases of judgments rendered on verdicts. *Williams v. Atwood*, 52 Ga. 585 (1874).

**Judgment must be regularly entered upon a confession of judgment.** *Whitley v. Southern Whsle. Corp.*, 45 Ga. App. 445, 164 S.E. 903 (1932).

**Entering up judgment.** — In a case in a justice of the peace court, when an appeal will lie, the appeal can be made from a confession of judgment without any formal entering up of judgment by the justice on the confession. *Huff v. Whitner, Manry & Co.*, 8 Ga. App. 25, 68 S.E. 463 (1910).

**Meaning of "confession of judgment".** — "Confession of judgment" has reference to the act of the defendant whereby the defendant admits or confesses the right of the plaintiff to take a judgment against the defendant, and not to the entering up, or rendition of, the judgment itself which is rendered upon the defendant's confession of judgment. *Thomas v. Bloodworth*, 44 Ga. App. 44, 160 S.E. 709 (1931).

**Pendency of an action as a prerequisite.** — Confession of judgment which would authorize an entry of judgment thereon cannot be made until an action is instituted, and such confession of judgment must be made in a suit and after the suit's institution. *Information Buying Co. v. Miller*, 173 Ga. 786, 161 S.E. 617 (1931).

Confession of judgment is the substitute for a verdict, and no such confession can be made until a suit is filed, and no confession of judgment can be entered unless the cause has been regularly sued out and docketed as in other cases. *Information Buying Co. v. Miller*, 173 Ga. 786, 161 S.E. 617 (1931).

Before there can be a valid action pending in any court, the court must have jurisdiction of the parties. Thus, this section contemplates the pendency of a valid action, when the jurisdiction of the court is unquestioned, and nothing more, before there may be a confession of judgment by either party as provided by this section,

and this would be true whether such party is an individual, a partnership, or a corporation. *Wade v. Combined Mut. Cas. Co.*, 201 Ga. 318, 39 S.E.2d 681 (1946).

**Valid ground for setting aside judgment.** — Allegation, in a motion to set aside a judgment rendered on a confession of judgment, that "at the time said confession was entered" the suit had not been docketed as provided in this section, constitutes a ground for setting aside the judgment. *Thomas v. Bloodworth*, 44 Ga. App. 44, 160 S.E. 709 (1931).

**Relationship to common law judgments by confession.** — Courts should construe this section in connection with the common-law principle that a confession of judgment is one made after the action is commenced; and so construing the judgment, hold that no confession of judgment, made before suit is commenced, can be entered in a cause commenced after the confession is made, and that no valid judgment can be rendered upon such confession so made and entered. *Information Buying Co. v. Miller*, 173 Ga. 786, 161 S.E. 617 (1931); *Whitley v. Southern Whsle. Corp.*, 45 Ga. App. 445, 164 S.E. 903 (1932).

This section has no application to judgments by confession at the common law, which had to be entered after action had been brought and process had been regularly served. *Greenfield v. Chronicle Printing Co.*, 107 Ga. App. 442, 130 S.E.2d 526 (1963).

**When entering of judgment not authorized.** — Agreement by a debtor to confess judgment in behalf of the creditor, which was made months prior to the institution of a suit, did not authorize the entering of a judgment of confession in a suit afterwards instituted. *Information Buying Co. v. Miller*, 173 Ga. 786, 161 S.E. 617 (1931).

**Confession itself is not the judgment of the court,** but amounts to no more than an admission of indebtedness, and an agreement to take judgment thereon when the judgment can properly be rendered. *Information Buying Co. v. Miller*, 173 Ga. 786, 161 S.E. 617 (1931); *Whitley v. Southern Whsle. Corp.*, 45 Ga. App. 445, 164 S.E. 903 (1932).



**Authority to confess may be given by warrant of attorney** executed at the time the debt is created. *Greenfield v. Chronicle Printing Co.*, 107 Ga. App. 442, 130 S.E.2d 526 (1963).

**Effect on third persons.** — When a party, upon equitable proceeding filed while the court is in session, obtains by consent a general judgment, such judgment, while good inter partes, cannot affect the rights of third persons. *Ainsworth v. Mobile Fruit & Trading Co.*, 102 Ga. 123, 29 S.E. 142 (1897).

**Full faith and credit in foreign state.** — When a resident of this state executed a promissory note, to be enforced in the State of Pennsylvania, by agreeing to a confession of judgment in the event of default, and waiving the right to personal service, such agreement is enforceable and the judgment based thereon is valid and entitled to full faith and credit in this state. *Parker v. Fidelity Bank*, 151 Ga. App. 733, 261 S.E.2d 465 (1979).

**Full faith and credit is given by courts of this state** to valid judgments from other states, when such judgments do not contravene Georgia laws. A valid judgment by confession of an attorney in a court is not such a judgment as would be contravened by the provisions of this section. *Cocke v. Truslow*, 91 Ga. App. 645, 86 S.E.2d 686 (1955). For comment, see 18 Ga. B.J. 92 (1955).

**When judgment not contrary to Georgia laws.** — Judgment obtained in a foreign state in an action upon a note which contained a confession of judgment clause, where an attorney appeared for the defendant, and personal service was obtained upon the nonresident defendant in Georgia, is not contrary to the policy or laws of this state. *Melnick v. Bank of Highwood*, 151 Ga. App. 261, 259 S.E.2d 667 (1979).

**Cited in** *Wade v. Combined Mut. Cas. Co.*, 201 Ga. 318, 39 S.E.2d 681 (1946).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 46 Am. Jur. 2d, Judgments, § 204 et seq.

**C.J.S.** — 49 C.J.S., Judgments, §§ 170, 173, 174, 175.

**ALR.** — Warrant to confess judgment as affected by statute of limitations, 21 ALR 774; 172 ALR 997.

Power of municipality to consent to judgment against itself, 67 ALR 1503.

Validity and effect of cognovit or warrant of attorney to confess judgment in conditional sale contract, 89 ALR 1106.

Correction of mistake in judgment entered under warrant of attorney to confess judgment, 144 ALR 830.

Necessity in action on judgment of sister state confessed under warrant of attorney, of alleging and proving the law of the latter state permitting such judgment, 155 ALR 921.

Necessity that the transcript of a judgment of another state upon a cognovit under warrant of attorney shall include the cognovit and the note containing the alleged warrant of attorney, 162 ALR 685.

Right to enter judgment by confession as affecting suspension of statute of limitations during absence of debtor from state, 172 ALR 997.

What law governs validity of warrant or power of attorney to confess judgment, 19 ALR2d 544.

Payment by obligor on note or other instrument containing warrant of attorney to confess judgment as extending time within which power to confess may be exercised, 35 ALR2d 1452.

Necessity, in order to enter judgment by confession on instrument containing warrant of attorney, that original note or other instrument and original warrant be produced or filed, 68 ALR2d 1156.

Successive judgments by confession on cognovit note or similar instrument, 80 ALR2d 1380.

Warrants of attorney to confess judgment: requirements as to signing, sealing, and attestation, 3 ALR3d 1147.

Constitutionality, construction, application, and effect of statute invalidating powers of attorneys to confess judgment or contracts giving such power, 40 ALR3d 1158.

Modern views of state courts as to whether consent judgment is entitled to res judicata or collateral estoppel effect, 91 ALR3d 1170.



**9-12-19. Judgment suspended by appeal.**

Where a judgment is entered and, within the time allowed for entering an appeal, an appeal is entered, the judgment shall be suspended. (Orig. Code 1863, § 3488; Code 1868, § 3511; Code 1873, § 3569; Code 1882, § 3569; Civil Code 1895, § 5340; Civil Code 1910, § 5935; Code 1933, § 110-303.)

**Cross references.** — For similar provisions, see § 5-3-7. As to certiorari and appeals to appellate courts generally, see

T. 5, C. 6. As to staying of proceedings to enforce judgments generally, see § 9-11-62.

**JUDICIAL DECISIONS**

**Suspension of judgment not to affect creditor's rights.** — While judgment is suspended upon the entering of an appeal, such suspension is not to affect the creditor's rights. *In re Tinsley*, 421 F. Supp. 1007 (M.D. Ga. 1976), *aff'd*, 554 F.2d 1064 (5th Cir. 1977).

**Appeal from order appointing administrator.** — Appeal from an ordinary's (now probate judge) order appointing an administrator suspends the judgment, but it does not vacate the judgment. *Shadburn Banking Co. v. Streetman*, 180 Ga. 500, 179 S.E. 377 (1935).

**Supersedeas deprives the trial court of jurisdiction** to take further proceedings towards enforcement of the judgment superseded. *Tyree v. Jackson*, 226 Ga. 642, 177 S.E.2d 159 (1970).

**Simultaneous state and federal ac-**

**tions.** — When simultaneous actions challenging the constitutionality of O.C.G.A. § 36-1-16 were pending in state and federal court, and an appeal from the federal district court order was pending, estoppel by judgment precluded state court consideration of the matter on appeal because judgments from a federal court remain binding during the pendency of an appeal and are not suspended. *Mayor of Forsyth v. Monroe County*, 260 Ga. 296, 392 S.E.2d 865 (1990).

**Cited in** *New Amsterdam Cas. Co. v. Russell*, 103 Ga. App. 553, 120 S.E.2d 150 (1961); *Lexington Developers, Inc. v. O'Neal Constr. Co.*, 143 Ga. App. 440, 238 S.E.2d 770 (1977); *Bell v. Bell*, 247 Ga. App. 462, 543 S.E.2d 455 (2000); *Amstead v. McFarland*, 287 Ga. App. 135, 650 S.E.2d 737 (2007).

**RESEARCH REFERENCES**

**C.J.S.** — 50 C.J.S., Judgments, § 850.

**ALR.** — Appeal from award of injunction as stay or supersedeas, 93 ALR 709.

Right of appeal from judgment or decree as affected by acceptance of benefit thereunder, 169 ALR 985.

Defeated party's payment or satisfaction of, or other compliance with, civil judgment as barring his right to appeal, 39 ALR2d 153.

Liability insurer's duty to pay injured person as affected by appeal or grant of new trial, or pendency of appeal or motion for new trial, from judgment against insured, or by the fact that time for appeal or motion for new trial has not expired, 31 ALR3d 899.

**9-12-20. Judgment when security given on appeal.**

In all cases of appeal where security has been given, the plaintiff or his attorney may enter judgment against the principal and his surety



jointly and severally. (Laws 1826, Cobb’s 1851 Digest, p. 498; Code 1863, § 3490; Code 1868, § 3513; Code 1873, § 3571; Code 1882, § 3571; Civil Code 1895, § 5342; Civil Code 1910, § 5937; Code 1933, § 110-305.)

JUDICIAL DECISIONS

**Verdict on trial of appeal in justice of the peace court.** — An attorney at law for a party in whose favor a verdict is rendered on the trial of an appeal in a justice of the peace court can enter in behalf of the attorney’s client a judgment on such verdict at any time within four days after the judgment of the court, and, if such judgment conforms to the verdict, the justice has no alternative but to transcribe the verdict upon the docket. *Scott v. Bedell*, 108 Ga. 205, 33 S.E. 903 (1899).

**Entering up judgment against defendant and sureties on replevy bond.** — When in the foreclosure of a landlord’s lien the defendant contested

the lien and gave a replevy bond for the eventual condemnation money, and the case was appealed to the superior court, after the jury found against the defendant, it was legal and proper to enter up judgment against the defendant, and also against the sureties on the replevy bond, without further notice to them. *Peppers v. Coil*, 113 Ga. 234, 38 S.E. 823 (1901).

**Cited in** *Bank of Charleston v. Moore*, 6 Ga. 416 (1849); *Scott v. Bedell*, 108 Ga. 205, 33 S.E. 903 (1899); *Bailey v. Ware & Harper*, 19 Ga. App. 255, 91 S.E. 275 (1917); *CS-Lakeview at Gwinnett v. Retail Dev. Partners*, 268 Ga. App. 480, 602 S.E.2d 140 (2004).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 5 Am. Jur. 2d, Appellate Review, §§ 325, 327.

**ALR.** — Right of appeal from judgment

or decree as affected by acceptance of benefit thereunder, 169 ALR 985.

9-12-21. Judgments transferable; status of transferee.

A person in whose favor a judgment has been entered or a person to whom a judgment has been transferred may bona fide and for a valuable consideration transfer any judgment to a third person. In all such cases the transferee of any judgment shall have the same rights and shall be subject to the same equities and to the same defenses as was the original holder of the judgment. (Laws 1829, Cobb’s 1851 Digest, p. 499; Code 1863, § 3516; Code 1868, § 3539; Code 1873, § 3597; Code 1882, § 3597; Civil Code 1895, § 5374; Civil Code 1910, § 5969; Code 1933, § 110-901.)

**Law reviews.** — For note discussing whether the bankruptcy estate includes proceeds of a judgment for personal injury

obtained by the bankrupt, see 32 Mercer L. Rev. 983 (1981).

JUDICIAL DECISIONS

**Meaning of section.** — Former Civil Code 1910, § 5969 (see now O.C.G.A. § 9-13-34) (right to transfer execution)

and former Code 1933, § 110-901 (see now O.C.G.A. § 9-12-21) declare in express terms the same principles involved in for-



mer Civil Code 1910, §§ 4342 and 5670 (see now O.C.G.A. § 9-13-75) (setoff of judgments). *Odom v. Attaway*, 173 Ga. 883, 162 S.E. 279 (1931).

**Multiple transfers or assignments of judgments allowed.** — Under the terms of former Civil Code 1910, § 5969 (see now O.C.G.A. § 9-13-34) (right to transfer execution) former Civil Code 1910, § 5969 (see now O.C.G.A. § 9-12-21), a judgment may be transferred or assigned any number of times, provided there was good faith, and in all cases when done in good faith the transferee shall have the same rights, and be liable to the same equities, and subject to the same defenses as the original plaintiff in judgment was. *Odom v. Attaway*, 173 Ga. 883, 162 S.E. 279 (1931).

**This section does not render judgments negotiable** in the strict sense so as to place the judgments on the high commercial plane occupied by negotiable paper. *Western Nat'l Bank v. Maverick Nat'l Bank*, 90 Ga. 339, 16 S.E. 942, 35 Am. St. R. 210 (1892); *Register v. Southern States Phosphate & Fertilizer Co.*, 157 Ga. 561, 122 S.E. 323 (1924).

**Judgments still subject to prior equities.** — Though judgments and executions are called negotiable, it certainly cannot be in any sense which raises them to any dignity higher than that which they enjoyed before. They are still subject to all prior equities. *Cohen v. Prater*, 56 Ga. 204 (1876).

**Formalities of transfer or assignment.** — To pass legal title by the plaintiff in execution, there must be an endorsement or assignment thereof in writing. Delivery is not essential if the intention of the plaintiff in writ of fieri facias was to pass title to the transferee. *Colter v. Livingston*, 154 Ga. 401, 114 S.E. 430 (1922); *Arnold v. Citizens' & S. Nat'l Bank*, 47 Ga. App. 254, 170 S.E. 316 (1933).

**Formal deed of assignment is not necessary**, but evidence in writing, which shows that the plaintiff has conveyed the interest in the judgment or execution to the person claiming to be the assignee, will be sufficient. *Dugas v. Mathews*, 9 Ga. 510, 54 Am. Dec. 361 (1851).

**Transfer in writing need not be under seal.** *Loganville Banking Co. v. Broadnax*, 151 Ga. 88, 106 S.E. 4 (1921).

**Protected equities are between the parties.** — Equities protected by this section, irrespective of notice, are equities between the parties to the judgment, and not those in favor of strangers to the judgment, as to whose names and interest the record is silent. *Western Nat'l Bank v. Maverick Nat'l Bank*, 90 Ga. 339, 16 S.E. 942, 35 Am. St. R. 210 (1892); *Parker v. Planters Bank*, 142 Ga. 160, 82 S.E. 556 (1914).

**Assignee of a judgment could transfer the judgment** to another. *Price v. Bradford*, 5 Ga. 364 (1848); *Register v. Southern States Phosphate & Fertilizer Co.*, 157 Ga. 561, 122 S.E. 323 (1924).

**Assignee of foreign judgment held not joint defendant.** — Georgia rules as to the consequences which result from payment by one defendant of a joint judgment and of one's receipt back of an assignment from the judgment-creditor have no application when, as to the defendant, the plaintiff did not pay a joint judgment, the only payment made by the plaintiff was in settlement of a second suit in Alabama, in which action the defendant was not a party, and the plaintiff is not a joint defendant as to the underlying judgment in the first suit in Alabama, which individual judgment against the defendant it is that plaintiff seeks to domesticate as the assignee thereof. *Lacy v. Ceravolo*, 180 Ga. App. 307, 348 S.E.2d 726 (1986).

**Transfer of writ of fieri facias.** — Without express authority, a sheriff cannot transfer a writ of fieri facias in the sheriff's hands for collection. *Hardwick & Co. v. Cash*, 140 Ga. 608, 79 S.E. 532 (1913).

**When judgment amendable between parties.** — When the rights of an executrix of her husband's estate, as bona fide transferee of a judgment, are derivative of one of the original party defendants, the judgment is subject to amendment as between the parties. *Franklin v. Sea Island Bank*, 120 Ga. App. 654, 171 S.E.2d 866 (1969).

**Assignment and enforcement of partial judgments.** — Assignment of a partial judgment under O.C.G.A. § 9-12-21 was analogous to the assignment of a portion of a debt and, under



Georgia law, when an assignment conveyed only a portion of a debt, it was not enforceable unless the debtor consented thereto because a creditor should not be allowed to split a single claim into many claims thereby subjecting the debtor to a multiplicity of suits; just as a creditor should not be allowed to split a single claim into many claims, neither should a judgment holder be allowed to split a judgment and subject a defendant to a

multiplicity of suits, without the consent of the defendant. *Rathbone v. Ward*, 268 Ga. App. 822, 603 S.E.2d 20 (2004).

**Cited** in *Hill v. McCulloch*, 20 Ga. 637 (1856); *Hardwick & Co. v. Cash*, 140 Ga. 608, 79 S.E. 532 (1913); *Commercial Credit Co. v. Jones Motor Co.*, 46 Ga. App. 464, 167 S.E. 768 (1933); *Wages v. State Farm Mut. Auto. Ins. Co.*, 132 Ga. App. 79, 208 S.E.2d 1 (1974).

### OPINIONS OF THE ATTORNEY GENERAL

**Transfer improper.** — Transfer by a parent of a child support judgment without resulting benefit to the child would be inconsistent with the parent's duties as

natural guardian of the child and the child's property. 1972 Op. Att'y Gen. No. 72-147.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 46 Am. Jur. 2d, Judgments, §§ 170, 431 et seq.

**C.J.S.** — 49 C.J.S., Judgments, § 832 et seq.

**ALR.** — Entering judgment as collateral security, 3 ALR 851.

Agreement for contingent fee as assignment of interest in judgment, 19 ALR 399.

Necessity and sufficiency of notice of assignment of judgment to affect stranger dealing with real property on which the judgment is a lien, 30 ALR 820.

Payment of judgment by debtor without notice of its assignment, 32 ALR 1021.

Assignment of judgment, or an interest

therein, to attorney for his services in procuring it, as subject to setoff of judgment against the assignor, 51 ALR 1278.

Assignment of judgment as carrying collateral rights of assignor as to incidental bonds, 63 ALR 290.

Judgment in tort action as subject of assignment, attachment, or garnishment pending appeal, 121 ALR 420.

Enforceability of warrant of attorney to confess judgment against assignee, guarantor, or other party obligating himself for performance of primary contract, 5 ALR3d 426.

### 9-12-22. Effect of transfer by attorney; ratification.

The transfer of a judgment by the attorney of record of the person in whose favor the judgment was entered shall be good to pass the title thereto as against every person except the person in whose favor judgment was entered or his assignee without notice. Ratification by the plaintiff shall estop him also from denying the transfer. Receipt of the money from the transfer shall be such a ratification. (Orig. Code 1863, § 3517; Code 1868, § 3540; Code 1873, § 3598; Code 1882, § 3598; Civil Code 1895, § 5375; Civil Code 1910, § 5970; Code 1933, § 110-902.)



## JUDICIAL DECISIONS

**Reason judgment held by assignee not subject to setoff favoring judgments against assignor.** — Claim of the assignee of a judgment is subject to such equities and defenses as may have existed in favor of the judgment debtor against the judgment creditor at the time of the assignment, but is not subject to rights which did not then exist in favor of such judgment debtor and of which the debtor did not become possessed until some time later as by the subsequent purchase of judgments against the judgment creditor.

Accordingly, a judgment which is held by an assignee is not subject to a setoff in favor of judgments existing against the assignor, but not acquired by the judgment debtor until after the assignment of the former judgment. *Sheffield v. Preacher*, 175 Ga. 719, 165 S.E. 742 (1932).

**Cited** in *Kennedy v. Redwine*, 59 Ga. 327 (1877); *Southern Star Lightning Rod Co. v. Duvall*, 64 Ga. 262 (1879); *Shurley v. Black*, 156 Ga. 683, 119 S.E. 618 (1923).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 46 Am. Jur. 2d, Judgments, § 170.

**C.J.S.** — 49 C.J.S., Judgments, § 832 et seq.

**ALR.** — Payment of judgment by debtor without notice of its assignment, 32 ALR 1021.

Enforceability of warrant of attorney to confess judgment against assignee, guarantor, or other party obligating himself for performance of primary contract, 5 ALR3d 426.

## 9-12-23. Effect of consent judgment.

The consent of the parties to a judgment has the effect of removing any issuable defenses previously filed. After such a consent the court may render judgment without the verdict of a jury. (Code 1981, § 9-12-23, enacted by Ga. L. 1982, p. 1262, § 1.)

## JUDICIAL DECISIONS

**Consent judgment not binding on nonparty.** — Consent judgment and the determination therein that the settlement is “just and fair” are not binding upon a nonparty joint tortfeasor sued for contribution. *Wilson v. Norfolk S. Corp.*, 200 Ga. App. 523, 409 S.E.2d 84 (1991).

**Testing consent judgment by extraordinary motion for new trial.** — Putative father’s petition for a blood test was, in substance, an extraordinary motion for a new trial based on newly discov-

ered evidence and O.C.G.A. § 9-12-23 was not a barrier to his attack upon an earlier consent judgment entered in a support proceeding. *Department of Human Resources v. Browning*, 210 Ga. App. 546, 436 S.E.2d 742 (1993).

**Cited** in *New v. Wilkins*, 178 Ga. App. 337, 343 S.E.2d 136 (1986); *Venture Design, Ltd. v. Original Appalachian Artworks, Inc.*, 197 Ga. App. 432, 398 S.E.2d 781 (1990).



ARTICLE 2  
EFFECT OF JUDGMENTS

9-12-40. Judgment conclusive between which persons and on what issues.

A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside. (Orig. Code 1863, § 3496; Code 1868, § 3519; Code 1873, § 3577; Code 1882, § 3577; Civil Code 1895, §§ 3742, 5348; Civil Code 1910, §§ 4336, 5943; Code 1933, § 110-501.)

**History of Code section.** — The language of this Code section is derived in part from the decision in *Watkins v. Lawton*, 69 Ga. 671 (1882).

**Law reviews.** — For article, “Uninsured Motorist Coverage in Georgia,” see 4 Ga. St. B.J. 329 (1968). For article surveying Georgia cases dealing with environment, natural resources, and land use from June 1977 through May 1978, see 30 Mercer L. Rev. 75 (1978). For annual survey article on trial practice and procedure, see 50 Mercer L. Rev. 359 (1998). For article, “Construction Law,” see 53 Mercer L. Rev. 173 (2001). For survey article on

domestic relations cases for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 223 (2003). For survey article on construction law, see 60 Mercer L. Rev. 59 (2008).

For note, “Res Judicata in the Georgia Courts,” see 11 Ga. L. Rev. 929 (1977). For case note, “*Lynch v. Waters*: Tolling Georgia’s Statute of Limitations for Medical Malpractice,” see 38 Mercer L. Rev. 1493 (1987).

For case comment, “*Yost v. Torok and Abusive Litigation*: A New Tort to Solve an Old Problem,” see 21 Ga. L. Rev. 429 (1986).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
SAME PARTIES AND PRIVIES  
LAW OF THE CASE  
RES JUDICATA  
ESTOPPEL BY JUDGMENT

General Consideration

**Basis for laws relating to conclusiveness.** — Former Code 1933, §§ 110-501 and 110-503 (see now O.C.G.A. §§ 9-12-40 and 9-12-42) provide the primary basis for the laws relating to conclusiveness of judgments. *Gilmer v. Porterfield*, 233 Ga. 671, 212 S.E.2d 842 (1975).

**Meaning of section.** — Read together and affirmatively, O.C.G.A. §§ 9-12-40 and 9-12-42 (judgment no bar absent de-

cision on merits) provide that a judgment on the merits of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue, or which under the rules of law might have been put in issue, in the cause wherein the judgment was rendered, until such judgment shall be reversed or set aside. *Transamerica Ins. Co. v. Thrift-Mart, Inc.*, 159 Ga. App. 874, 285 S.E.2d 566 (1981).

**Apparent conflict with other sec-**



**General Consideration (Cont'd)**

**tions reconciled.** — Apparent conflict between former Civil Code 1910, §§ 4336 and 5943 (see now O.C.G.A. § 9-12-40) and former Code 1910, §§ 4335, 4337, 5678, and 5679 (see now O.C.G.A. §§ 9-2-44 and 9-12-42) was reconciled by the fact that former Civil Code 1910, §§ 4335, 4337, 5678, and 5679 (see now O.C.G.A. §§ 9-2-44 and 9-12-42) have special application to estoppels by judgment, and this section applied when a plea of res adjudicata was available. *Camp v. Lindsay*, 176 Ga. 438, 168 S.E. 284 (1933).

**Actions must be based on same cause of action.** — This section is operative only if the two actions are based upon the same cause of action. *Brown v. Georgia Power Co.*, 371 F. Supp. 543 (S.D. Ga. 1973), *aff'd*, 491 F.2d 117 (5th Cir.), *cert. denied*, 419 U.S. 838, 95 S. Ct. 66, 42 L. Ed. 2d 65 (1974).

**Factors in determining if claim is barred.** — In deciding whether this section operates to bar a state court claim, the Court of Appeals will consider: (a) whether there is a valid antecedent judgment; (b) whether there is identity of parties; (c) whether there is identity of issues; and (d) whether reasons of public policy militate against a strict application of this section in this case. *Fierer v. Ashe*, 147 Ga. App. 446, 249 S.E.2d 270 (1978).

**Effect of stare decisis.** — Stare decisis, unlike res judicata or collateral estoppel, does not involve claim preclusion or issue preclusion; stare decisis does not work as a bar but only dictates the conclusion of law which will be made upon a given set of facts. *Norris v. Atlanta & W.P.R.R.*, 254 Ga. 684, 333 S.E.2d 835 (1985).

In plaintiff consumer's Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq., action against defendant collection attorney, when the consumer's counsel presented to the court two unpublished opinions from Georgia trial courts as supporting an argument that the collection attorney's state court deficiency action was barred by the statute of limitations, those unpublished opinions were not persuasive authority. *Almand v. Reynolds & Robin, P.C.*, 485 F. Supp. 2d 1361 (M.D. Ga. 2007).

**Res judicata and estoppel by judgment distinguished.** — While res judicata applies only as between the same parties and upon the same cause of action to matters which were actually in issue or which under the rules of law could have been put in issue, estoppel by judgment applies as between the same parties upon any cause of action to matters which were directly decided in the former suit. *Spence v. Erwin*, 200 Ga. 672, 38 S.E.2d 394 (1946); *Harvey v. Wright*, 80 Ga. App. 232, 55 S.E.2d 835 (1949); *A.R. Hudson Realty, Inc. v. Hood*, 151 Ga. App. 778, 262 S.E.2d 189 (1979); *Firestone Tire & Rubber Co. v. Pinyan*, 155 Ga. App. 343, 270 S.E.2d 883 (1980); *Roddenbery v. Roddenbery*, 255 Ga. 715, 342 S.E.2d 464 (1986); *Jim West Housemovers v. Cobb County*, 259 Ga. 314, 380 S.E.2d 251 (1989).

Generally, res judicata bars relitigation of any matter of a cause of action that was, or could have been, put in issue and adjudicated in a prior proceeding between the same parties, while estoppel by judgment prevents relitigation in a subsequent suit (involving a different cause of action) of a matter which was actually adjudicated in a former case. Neither defense, however, is available unless the subsequent suit is between the same parties or their privies. *Blackburn v. Blackburn*, 168 Ga. App. 66, 308 S.E.2d 193 (1983).

**Former decision must have been based on merits.** — In deciding whether this section operates to bar a state court claim, it must have been based not on purely technical grounds but at least in part on the merits when under the pleadings they were or could have been involved. *Sumner v. Sumner*, 186 Ga. 390, 197 S.E. 833 (1938); *Thompson v. Thompson*, 199 Ga. 692, 35 S.E.2d 262 (1945); *Powell v. Powell*, 200 Ga. 379, 37 S.E.2d 191 (1946).

**Same parties or their privies as a prerequisite.** — Res judicata and estoppel by judgment can only be set up in a subsequent suit between the same parties or their privies. *Owens v. Williams*, 87 Ga. App. 238, 73 S.E.2d 512 (1952); *Walka Mt. Camp, No. 565, Woodmen of World, Inc. v. Hartford Accident & Indem. Co.*, 222 Ga. 249, 149 S.E.2d 365 (1966); *Anderson Oil Co. v. Benton Oil Co.*, 246 Ga. 304, 271 S.E.2d 207 (1980).



**Former judgment binds only as to the facts in issue** and events existing at the time of such judgment, and does not prevent a re-examination even of the same questions between the same parties, if in the interval the material facts have so changed or such new events have occurred as to alter the legal rights or relations of the litigants; although, in the absence of evidence to the contrary, the facts as the facts existed at the time of the former judgment would be presumed to continue. *Durham v. Crawford*, 196 Ga. 381, 26 S.E.2d 778 (1943).

**Neither res judicata nor collateral estoppel shown.** — When a claimant in action conveyed property in dispute before a claim was filed, a judgment finding the property levied on not to be subject to levy is not res judicata nor a collateral estoppel in favor of one to whom the claimant conveyed the property. *Goodwin v. Bowen*, 184 Ga. 408, 191 S.E. 691 (1937).

**Subsequent pleadings different only as to degree of detail.** — Effect of a judgment cannot be avoided by a difference in the pleadings, when those in the first case could and should have been as full as those in the second, though in fact the pleadings were not. *Booker v. Booker*, 107 Ga. App. 339, 130 S.E.2d 260 (1963).

**Single cause of action with several elements of damage** admits of but one action, when there is an identity of subject matter and of parties. *Massey v. Stephens*, 155 Ga. App. 243, 270 S.E.2d 796 (1980).

**Plaintiff is not permitted to split a plaintiff's single cause of action** to seek in successive litigation the enforcement of first one remedy and then a second. *Massey v. Stephens*, 155 Ga. App. 243, 270 S.E.2d 796 (1980).

**Principle test for comparing causes of action** is whether or not the primary right and duty, and the delict or wrong are the same in each action. *Brown v. Georgia Power Co.*, 371 F. Supp. 543 (S.D. Ga. 1973), *aff'd*, 491 F.2d 117 (5th Cir.), *cert. denied*, 419 U.S. 838, 95 S. Ct. 66, 42 L. Ed. 2d 65 (1974).

**Prerequisites to personal judgments and relief.** — Personal judgment cannot be obtained against a person who is not named as a party defendant and properly served in the action. Nor may a

judgment be rendered against a party defendant in favor of one who is not party to the case. Neither can the court grant relief as to matters not pleaded. *Burgess v. Nabers*, 122 Ga. App. 445, 177 S.E.2d 266 (1970).

**When collateral questions are conclusive.** — Judgment will not be conclusive on the trial of another case between the same parties involving the same question when a question comes collaterally before a court, and a judgment is rendered in the case, and it does not appear, except by inference from the judgment, the pleadings, and the evidence, that the question collaterally made was actually passed upon. *Cravey v. Druggists Coop. Ice Cream Co.*, 66 Ga. App. 909, 19 S.E.2d 845 (1942).

**When it's a matter of conjecture as to issues litigated.** — Judgment is not an estoppel if a judgment and extrinsic evidence leave it as a mere matter of conjecture as to what questions of fact were litigated and determined in the former action. *Cravey v. Druggists Coop. Ice Cream Co.*, 66 Ga. App. 909, 19 S.E.2d 845 (1942).

**Intestacy determination.** — When the court of ordinary (now probate court) had determined an intestacy, such an adjudication is not conclusive to the same extent as other judgments. On the contrary, the question would seem to be open for future consideration in the event a will should be brought to the attention of the court in a proper manner. *Walden v. Mahnks*, 178 Ga. 825, 174 S.E. 538 (1934).

**Setting aside judgment of superior court.** — Judgment of the superior court, apparently regular and legal, can only be set aside in a proper proceeding for that purpose in the court wherein the judgment was rendered. *Barron v. Lovett*, 207 Ga. 131, 60 S.E.2d 458 (1950).

**Construction that renders judgment legal preferred.** — When a judgment is susceptible of two meanings, one of which would render the judgment illegal and the other proper, that construction will, if reasonably possible, be given the judgment that would render the judgment legal. *Byrd v. Goodman*, 195 Ga. 621, 25 S.E.2d 34 (1943).

**Judgment on affidavit of illegality of execution is a bar to equitable re-**



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**lief thereafter.** *Cone v. Eubanks*, 167 Ga. 384, 145 S.E. 652 (1928).

**Defenses of defendant in execution.**

— Defendant in execution may not by affidavit of illegality make the defense of payment of debt, but only the payment of the execution itself. *Felker v. Johnson*, 189 Ga. 797, 7 S.E.2d 668 (1940).

**Settlement attempt made after judgment rendered.** — Petitioner cannot, after judgment, set up a settlement of the cause of action made before rendition of the judgment. *Felker v. Johnson*, 189 Ga. 797, 7 S.E.2d 668 (1940).

**Special plea filed after judgment of affirmance.** — Affirmance of the judgment without condition or direction left the trial court without jurisdiction to entertain or pass on a "special plea" filed after the judgment of affirmance. *Federal Inv. Co. v. Ewing*, 166 Ga. 246, 142 S.E. 890 (1928).

**Creditor proceeding against trust property to satisfy personal judgment.** — When a creditor obtains a personal judgment against a trustee on a note executed by the latter for goods, merchandise, and cash obtained and used for the benefit of the cestuis que trust, and on which a nulla bona has been returned, the creditor may proceed to subject the trust property to the payment of the judgment. The judgment against the trustee does not render the subsequent proceeding *res adjudicata*. *Faulk v. Smith*, 168 Ga. 448, 148 S.E. 100 (1929).

**Binding nature of valid judgment.**

— Judgment rendered between creditor and debtor, until set aside for fraud, accident, mistake, or other cause, was conclusive and binding between them as to the amount of the indebtedness. The agreement alleged to have been made between the parties therefore was without consideration and not binding. *Creswell v. Bryant Hdwe. Co.*, 166 Ga. 228, 142 S.E. 885 (1928).

Since the municipal court had jurisdiction of the subject matter and of the parties and, although the defendant in that suit defended upon the ground that the plaintiff's right was an equitable one only and was cognizable only in a court of

equity, the court nevertheless had jurisdiction to determine this question, the judgment against the defendant was *res judicata* as to the matter pled and of the plaintiff's right to recover. *Hood v. Bibb Brokerage Corp.*, 48 Ga. App. 606, 173 S.E. 236 (1934).

One who obtained a judgment from a court of competent jurisdiction will not be heard to question the judgment's validity when the court has acted within the court's jurisdiction and the proceedings are otherwise legal. *Thomas v. Travelers Ins. Co.*, 53 Ga. App. 404, 185 S.E. 922 (1936); *Shaw v. Davis*, 119 Ga. App. 801, 168 S.E.2d 853 (1969).

All questions between parties once and finally settled by a solemn decree must be considered an end to the litigation. Those questions cannot be relitigated in other actions directly or indirectly. Final judgment of the court cannot be reviewed between the same parties in the superior court or on writ of error to the Supreme Court. One of the prime objects of judicial procedure is to forever settle and end disputes between litigants, and courts never look with favor on the unnecessary prolongation of litigation, and particularly disapprove attempts to ignore or evade binding judgments. *Lankford v. Holton*, 196 Ga. 631, 27 S.E.2d 310 (1943); *Rewis v. Bennett*, 213 Ga. 535, 100 S.E.2d 196 (1957); *Smith v. Robinson*, 214 Ga. 835, 108 S.E.2d 317 (1959); *Bowman v. Bowman*, 215 Ga. 560, 111 S.E.2d 226 (1959).

Principle which fixes the absolute conclusiveness of a judgment of a court of competent jurisdiction upon the parties and their privies applies whether the reasons upon which the judgment was based were sound or not, and even if no reasons at all were given. *McRae v. Boykin*, 73 Ga. App. 67, 35 S.E.2d 548 (1945), cert. denied, 328 U.S. 844, 66 S. Ct. 1024, 90 L. Ed. 1618 (1946).

Regardless of the correctness of the trial court's decision, it cannot be relitigated. *Johnston v. Duncan*, 227 Ga. 298, 180 S.E.2d 348 (1971).

**Consent decree involving title to realty** was not void for want of any description or for want of any words to furnish a key to any description of the lands when pleadings on which consent



decree was based gave a complete description of the property. *Bentley v. Still*, 198 Ga. 743, 32 S.E.2d 814 (1945).

**Consent judgment rendered to conform with a settlement agreement** without a party's participation would not come within this section, there having been no judicial decision upon the merits in the absence of a true adversary proceeding. *Blakely v. Couch*, 129 Ga. App. 625, 200 S.E.2d 493 (1973).

**Condemnation judgment must be set aside before injunction available.**

— When a court having jurisdiction of condemnation proceedings enters a judgment that the lands are condemned for public purposes, the condemnee has no right to enjoin the taking and use of the lands by the condemnor, without first having the judgment of condemnation vacated or set aside. *Hogg v. City of La Grange*, 202 Ga. 764, 44 S.E.2d 760 (1947).

**Judgment discharging an administrator** relieves the administrator from further liability to those interested in the estate, unless such judgment is set aside either on motion in the court of ordinary, or by equitable proceeding in the superior court. *Stanton v. Gailey*, 72 Ga. App. 292, 33 S.E.2d 747 (1945).

**Introduction of entire record along with decree offered in evidence.** — When a decree is offered in evidence to establish any particular state of facts, or as an adjudication upon the subject matter, such decree is admissible only when accompanied by the entire record of the suit in which the decree was rendered. *Holcombe v. Jones*, 197 Ga. 825, 30 S.E.2d 903 (1944).

**Disallowing bankruptcy claim for untimely filing.** — Judgment of a court of bankruptcy disallowing a claim on the ground that the claim was not filed within the time is not an adjudication upon the merits of the claim, and when thereafter, the holder of such claim attempts to enforce the claim by levy upon the property of the bankrupt, it is error to sustain an affidavit of illegality thereto on the ground that the judgment of the bankruptcy court was an adjudication that the judgment was not a valid lien against the property of the bankrupt. *Georgia Sec. Co. v. Ar-*

*nold*, 56 Ga. App. 532, 193 S.E. 366 (1937).

**Master and servant relationship does not ipso facto constitute privity** for purposes of res judicata or estoppel by judgment. *Porterfield v. Gilmer*, 132 Ga. App. 463, 208 S.E.2d 295 (1974), *aff'd*, 233 Ga. 671, 212 S.E.2d 842 (1975).

**Construction in conjunction with section prescribing time for filing answers.** — Former Code 1933, § 85-1509 (see now O.C.G.A. § 44-6-165), prescribing the time in which answers may be filed, must be construed in harmony with the rule as to the conclusiveness of judgments, and will not authorize parties to file objections to the return of partitioners on grounds which were adjudicated upon the hearing of the application for their appointment. *Cates v. Duncan*, 181 Ga. 686, 183 S.E. 797 (1936).

**State court review upholding administrative determination as to constitutional violations.** — Although a person asserting constitutional violations is entitled to a de novo hearing in federal court, regardless of whether the person resorted to an administrative hearing or whether such hearing purported to decide constitutional issues, when there has been state court review upholding an administrative determination, the state judicial determination is entitled to res judicata and collateral estoppel effect in the state court, and shall be given full faith and credit in federal court. *Sharpley v. Davis*, 786 F.2d 1109 (11th Cir. 1986).

**Subsequent action following failure to prosecute cause assumed from another.** — When buyer purchased encumbered property upon representation that the property was unencumbered, subsequently paid the seller's debt to avoid foreclosure and assumed the creditor's cause of action against the seller, and then allowed that action to be dismissed for lack of prosecution, the buyer's action against the seller for breach of warranty and against the attorney for malpractice was not barred. *Klosterman v. Tudor*, 170 Ga. App. 4, 315 S.E.2d 920 (1984).

**Judgment in prior proceeding found not binding in present litigation.** See *Shepard v. Byrd*, 581 F. Supp. 1374 (N.D. Ga. 1984).

**Motion to set aside judgment not barred.** — Res judicata and estoppel by



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judgment will not bar either a motion to set aside a judgment or an extraordinary motion for new trial based upon newly discovered evidence. *Herringdine v. Nalley Equip. Leasing, Ltd.*, 238 Ga. App. 210, 517 S.E.2d 571 (1999).

Superior court abused the court's discretion in denying a city's motion to set aside a judgment granting a police officer's demand for judgment on the Workers' Compensation Board's award because any earlier trial court orders were subject to a proper motion to set aside pursuant to O.C.G.A. § 9-12-40; the city was authorized to move to set aside the superior court's order granting the demand for judgment on the Board's award on the ground of mistake under O.C.G.A. § 9-11-60(d)(2). *City of Atlanta v. Holder*, 309 Ga. App. 811, 711 S.E.2d 332 (2011).

**Effect of voluntary dismissal with prejudice of action under federal act.**

— Voluntary dismissal with prejudice of action for penalties under federal Truth-In-Lending Act, 15 U.S.C. § 1601 et seq., as to bank merged the plaintiffs' entire cause of action, including rescission remedy, for nondisclosures and barred any subsequent action in this state against the seller for the seller's "joint and not separate" liability for failure to make the disclosures in the same transaction. *Massey v. Stephens*, 155 Ga. App. 243, 270 S.E.2d 796 (1980).

**Dismissal with prejudice is res judicata** of all questions which might have been litigated in the action and is a final disposition, barring the right to bring another action on the same claim. *Hutcheson Medical Ctr. v. Scealf*, 205 Ga. App. 204, 422 S.E.2d 20, cert. denied, 205 Ga. App. 900, 422 S.E.2d 20 (1992).

**Application of collateral estoppel by federal bankruptcy court.** — Although, under Georgia law, the collateral estoppel effect of a judgment entered against a debtor is not diminished by the fact that the judgment resulted from a default, the federal bankruptcy court, based on policy considerations, would not apply collateral estoppel to conclude from a state default judgment in a libel and slander case that the defendant's intent in

making alleged defamatory statements was willful and malicious so as to render the resulting debt nondischargeable in bankruptcy. *Wright v. McIntyre*, 57 Bankr. 961 (Bankr. N.D. Ga. 1986).

To the extent that issues relating to the fraudulent conduct of the debtor were decided in the state court fraud action, collateral estoppel bound the bankruptcy court to the determination made on those matters. *Moore v. Gill*, 181 Bankr. 666 (Bankr. N.D. Ga. 1995).

Since the opposing party could have, regarding a sanctions order imposed against the opposing party, raised an alleged error concerning that order in an appeal of a declaratory judgment action filed against the opposing party, but did not do so, the opposing party was precluded from arguing alleged error regarding the merits of that sanction order on the opposing party's appeal of a later contempt order for the opposing party's willful failure to comply with the sanctions order. *Franklin v. Gude*, 259 Ga. App. 521, 578 S.E.2d 170 (2003).

**Issue of taxability barred by past consent judgment.** — County board of tax assessors was collaterally estopped from re-litigating the issue of whether funeral vaults sold through pre-need burial packages but stored by their seller in the county were subject to ad valorem taxes under O.C.G.A. § 48-5-16 by a 2001 consent decree between the seller and the assessors that stated the vaults were not taxable. *Morgan County Bd. of Tax Assessors v. Vantage Prods. Corp.*, 323 Ga. App. 823, 748 S.E.2d 468 (2013).

**Cited in** *Bostwick v. Perkins, Hopkins & White*, 1 Ga. 136 (1846); *Stroup v. Sullivan*, 2 Ga. 275, 46 Am. Dec. 389 (1847); *Kenan & Rockwell v. Miller*, 2 Ga. 325 (1847); *Puffer Mfg. Co. v. Rivers*, 10 Ga. App. 154, 73 S.E. 20 (1911); *Jones v. Schacter*, 31 Ga. App. 709, 121 S.E. 691 (1924); *Burgamy v. Holton*, 165 Ga. 384, 141 S.E. 42 (1927); *Lester v. Southern Sec. Co.*, 168 Ga. 307, 147 S.E. 529 (1929); *McDonald Mtg. & Realty Co. v. Feingold*, 168 Ga. 763, 149 S.E. 132 (1929); *Odom v. Attaway*, 41 Ga. App. 51, 152 S.E. 148 (1930); *Eison v. Cocker*, 45 Ga. App. 122, 163 S.E. 511 (1932); *Sells v. Sells*, 175 Ga. 110, 165 S.E. 1 (1932); *George v. Cox*, 46



Ga. App. 125, 166 S.E. 868 (1932); *Walden v. Mahnks*, 178 Ga. 825, 174 S.E. 538 (1934); *McEntyre v. Merritt*, 49 Ga. App. 416, 175 S.E. 661 (1934); *National Life & Accident Ins. Co. v. Leo*, 50 Ga. App. 473, 178 S.E. 322 (1934); *Rosenthal v. Langley*, 180 Ga. 253, 179 S.E. 383 (1935); *Atlanta Sav. Bank v. Kurfees*, 181 Ga. 207, 181 S.E. 779 (1935); *Key v. Metropolitan Cas. Ins. Co.*, 181 Ga. 402, 182 S.E. 607 (1935); *Rozetta v. Rozetta*, 181 Ga. 494, 182 S.E. 847 (1935); *Gillis v. Atlantic Coast Line R.R.*, 52 Ga. App. 806, 184 S.E. 791 (1936); *Woods v. Travelers Ins. Co.*, 53 Ga. App. 429, 186 S.E. 467 (1936); *Ellis v. First Nat'l Bank*, 182 Ga. 641, 186 S.E. 813 (1936); *Jackson v. Massachusetts Mut. Life Ins. Co.*, 183 Ga. 659, 189 S.E. 243 (1936); *Crider v. Harris*, 183 Ga. 695, 189 S.E. 519 (1937); *Crane v. Stratton*, 185 Ga. 234, 194 S.E. 182 (1937); *Sheldon & Co. v. Emory Univ.*, 184 Ga. 440, 191 S.E. 497 (1937); *Simmons v. Williams Realty & Loan Co.*, 185 Ga. 154, 194 S.E. 356 (1937); *Byrd v. Prudential Ins. Co.*, 185 Ga. 310, 195 S.E. 403 (1937); *Hicks v. Wadsworth*, 57 Ga. App. 529, 196 S.E. 251 (1938); *United States v. Hatcher*, 185 Ga. 816, 196 S.E. 773 (1938); *McCollum v. Lark*, 187 Ga. 292, 200 S.E. 276 (1938); *Brinkley v. Newell*, 188 Ga. 678, 4 S.E.2d 827 (1939); *Blackwood v. Yellow Cab Co.*, 61 Ga. App. 149, 6 S.E.2d 126 (1939); *Penn Mut. Life Ins. Co. v. Childs*, 189 Ga. 835, 7 S.E.2d 907 (1940); *Whitfield v. Maddox*, 189 Ga. 878, 8 S.E.2d 54 (1940); *Loveless v. Carten*, 64 Ga. App. 54, 12 S.E.2d 175 (1940); *Morris v. Georgia Power Co.*, 65 Ga. App. 180, 15 S.E.2d 730 (1941); *Moody v. McHan*, 66 Ga. App. 29, 16 S.E.2d 889 (1941); *Allman v. Aldredge*, 193 Ga. 269, 18 S.E.2d 478 (1942); *Forrester v. Pullman Co.*, 66 Ga. App. 745, 19 S.E.2d 330 (1942); *Cravey v. Druggists Coop. Ice Cream Co.*, 66 Ga. App. 909, 19 S.E.2d 845 (1942); *Adams v. Higginbotham*, 194 Ga. 292, 21 S.E.2d 616 (1942); *Commercial Credit Corp. v. Citizens & S. Nat'l Bank*, 68 Ga. App. 393, 23 S.E.2d 198 (1942); *Lankford v. Holton*, 197 Ga. 212, 28 S.E.2d 747 (1944); *Bussell v. Glenn*, 197 Ga. 816, 30 S.E.2d 617 (1944); *Stanton v. Gailey*, 72 Ga. App. 292, 33 S.E.2d 747 (1945); *Andrews v. Aderhold*, 201 Ga. 132, 39 S.E.2d 61 (1946); *Williams v. Brannen*, 75

Ga. App. 773, 44 S.E.2d 493 (1947); *McCall v. Kliros*, 76 Ga. App. 89, 45 S.E.2d 72 (1947); *Settle v. McWhorter*, 203 Ga. 93, 45 S.E.2d 210 (1947); *Griffin v. Driver*, 203 Ga. 481, 46 S.E.2d 913 (1948); *Maddox v. Carithers*, 77 Ga. App. 280, 47 S.E.2d 888 (1948); *Gamble v. Gamble*, 204 Ga. 82, 48 S.E.2d 540 (1948); *Miller Serv., Inc. v. Miller*, 77 Ga. App. 413, 48 S.E.2d 761 (1948); *Turner v. Avant*, 205 Ga. 426, 54 S.E.2d 269 (1949); *Otwell Motor Co. v. Hill*, 79 Ga. App. 686, 54 S.E.2d 765 (1949); *Walton v. City of Atlanta*, 89 F. Supp. 309 (N.D. Ga. 1949); *Edenfield v. Lanier*, 206 Ga. 696, 58 S.E.2d 188 (1950); *Garr v. E.W. Banks Co.*, 206 Ga. 831, 59 S.E.2d 400 (1950); *Morris v. Morris*, 82 Ga. App. 384, 61 S.E.2d 156 (1950); *Gamble v. Gamble*, 207 Ga. 380, 61 S.E.2d 836 (1950); *Parker v. Cherokee Bldg. Supply Co.*, 207 Ga. 710, 64 S.E.2d 51 (1951); *McKenney v. Woodbury Banking Co.*, 208 Ga. 616, 68 S.E.2d 571 (1952); *Carswell v. Shannon*, 209 Ga. 596, 74 S.E.2d 850 (1953); *Routon v. Woodbury Banking Co.*, 209 Ga. 706, 75 S.E.2d 561 (1953); *Walker v. Hamilton*, 210 Ga. 155, 78 S.E.2d 511 (1953); *Brown v. Brown*, 89 Ga. App. 428, 80 S.E.2d 2 (1953); *Churchwell Bros. Constr. Co. v. Archie R. Briggs Constr. Co.*, 89 Ga. App. 550, 80 S.E.2d 212 (1954); *Gaulding v. Gaulding*, 210 Ga. 638, 81 S.E.2d 830 (1954); *Bennett v. Bennett*, 210 Ga. 721, 82 S.E.2d 653 (1954); *Malcom v. Webb*, 211 Ga. 449, 86 S.E.2d 489 (1955); *Baker v. Decatur Lumber & Supply Co.*, 211 Ga. 510, 87 S.E.2d 89 (1955); *Bostic v. Nesbitt*, 212 Ga. 198, 91 S.E.2d 484 (1956); *Threlkeld v. Whitehead*, 95 Ga. App. 378, 98 S.E.2d 76 (1957); *Galloway v. Merrill*, 213 Ga. 633, 100 S.E.2d 443 (1957); *Wells v. Keith*, 213 Ga. 858, 102 S.E.2d 533 (1958); *Allen v. Withrow*, 215 Ga. 388, 110 S.E.2d 663 (1959); *Shaw v. Miller*, 215 Ga. 413, 110 S.E.2d 759 (1959); *Beckanstin v. Dougherty County Council of Architects*, 215 Ga. 543, 111 S.E.2d 361 (1959); *Hackney v. Tench*, 216 Ga. 483, 117 S.E.2d 453 (1960); *Pattillo v. Atlanta & W.P.R.R.*, 216 Ga. 806, 120 S.E.2d 176 (1961); *Russ Transp., Inc. v. Jones*, 104 Ga. App. 612, 122 S.E.2d 282 (1961); *Blanton v. Blanton*, 217 Ga. 542, 123 S.E.2d 758 (1962); *King Sales Co. v. McKey*, 105 Ga. App. 787, 125 S.E.2d 684



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(1962); *Hardin v. Hardin*, 218 Ga. 39, 126 S.E.2d 216 (1962); *Banks v. Sirmans*, 218 Ga. 413, 128 S.E.2d 66 (1962); *John P. King Mfg. Co. v. Clay*, 218 Ga. 382, 128 S.E.2d 68 (1962); *Chandler v. Chandler*, 107 Ga. App. 124, 129 S.E.2d 370 (1962); *Lawhorn v. Atlantic Ref. Co.*, 299 F.2d 353 (5th Cir. 1962); *Fidelity & Cas. Co. v. Parham*, 218 Ga. 640, 129 S.E.2d 868 (1963); *West v. Hatcher*, 219 Ga. 540, 134 S.E.2d 603 (1964); *Carswell v. Cannon*, 110 Ga. App. 315, 138 S.E.2d 468 (1964); *Patent Scaffolding Co. v. Byers*, 220 Ga. 426, 139 S.E.2d 332 (1964); *Stoddard Cleaners, Inc. v. Carr*, 220 Ga. 707, 141 S.E.2d 434 (1965); *Sirmons v. Banks*, 220 Ga. 881, 142 S.E.2d 851 (1965); *Banks v. Employees Loan & Thrift Corp.*, 112 Ga. App. 38, 143 S.E.2d 787 (1965); *U.S. Fid. & Guar. Co. v. Dunbar*, 112 Ga. App. 102, 143 S.E.2d 663 (1965); *Horton v. Harvey*, 221 Ga. 799, 147 S.E.2d 505 (1966); *Deason v. DeKalb County*, 222 Ga. 63, 148 S.E.2d 414 (1966); *Sewell Dairy Supply Co. v. Taylor*, 113 Ga. App. 729, 149 S.E.2d 540 (1966); *Cromer v. Cromer*, 222 Ga. 365, 149 S.E.2d 804 (1966); *Adams v. Travelers Ins. Co.*, 114 Ga. App. 276, 151 S.E.2d 177 (1966); *Uddyback v. George*, 223 Ga. 311, 154 S.E.2d 577 (1967); *Martin v. Phelps*, 115 Ga. App. 552, 155 S.E.2d 447 (1967); *McDonald v. Hester*, 115 Ga. App. 740, 155 S.E.2d 720 (1967); *Sams v. McDonald*, 223 Ga. 451, 156 S.E.2d 31 (1967); *Connecticut Indem. Co. v. Gaudio*, 116 Ga. App. 672, 158 S.E.2d 680 (1967); *Wren Mobile Homes, Inc. v. Midland-Guardian Co.*, 117 Ga. App. 22, 159 S.E.2d 734 (1967); *Bailey v. Louisville & N.R.R.*, 117 Ga. App. 185, 160 S.E.2d 245 (1968); *First Fed. Sav. & Loan Ass'n v. First Nat'l Bank*, 224 Ga. 150, 160 S.E.2d 372 (1968); *Swinney v. Reeves*, 224 Ga. 274, 161 S.E.2d 273 (1968); *Franklin v. Sea Island Bank*, 120 Ga. App. 654, 171 S.E.2d 866 (1969); *Miami Properties, Inc. v. Fitts*, 226 Ga. 300, 175 S.E.2d 22 (1970); *American Liberty Ins. Co. v. Sanders*, 122 Ga. App. 407, 177 S.E.2d 176 (1970); *Leggett v. Gibson-Hart-Durden Funeral Home*, 123 Ga. App. 224, 180 S.E.2d 256 (1971); *Williams v. Nuckolls*, 229 Ga. 48, 189 S.E.2d 82 (1972); *Brown v. Edwards*, 229 Ga. 345, 191 S.E.2d 47 (1972); *Bauder Finishing & Career College, Inc. v. Kettle*, 230 Ga. App. 422, 197 S.E.2d 381 (1973); *Hite v. Waldrop*, 230 Ga. 684, 198 S.E.2d 665 (1973); *Whitlock v. State*, 230 Ga. 700, 198 S.E.2d 865 (1973); *Myers v. United Servs. Auto. Ass'n*, 130 Ga. App. 357, 203 S.E.2d 304 (1973); *Price v. Georgia Indus. Realty Co.*, 132 Ga. App. 107, 207 S.E.2d 556 (1974); *Harwell v. Harwell*, 233 Ga. 89, 209 S.E.2d 625 (1974); *Thomas v. Home Credit Co.*, 133 Ga. App. 602, 211 S.E.2d 626 (1974); *Allstate Ins. Co. v. Harris*, 133 Ga. App. 567, 211 S.E.2d 783 (1974); *National Bank v. Cut Rate Auto Serv., Inc.*, 133 Ga. App. 635, 211 S.E.2d 895 (1974); *Whitley Constr. Co. v. Whitley*, 134 Ga. App. 245, 213 S.E.2d 909 (1975); *Southern Motors of Savannah, Inc. v. Cleary*, 134 Ga. App. 278, 213 S.E.2d 920 (1975); *Adams v. Adams*, 234 Ga. 139, 214 S.E.2d 561 (1975); *Ivey v. Ivey*, 234 Ga. 532, 216 S.E.2d 827 (1975); *Green Acres Disct., Inc. v. Freid & Appell, Inc.*, 135 Ga. App. 816, 219 S.E.2d 39 (1975); *King v. Calhoun First Nat'l Bank*, 136 Ga. App. 239, 220 S.E.2d 759 (1975); *Colodny v. Krause*, 136 Ga. App. 379, 221 S.E.2d 239 (1975); *Alcovy Realty Co. v. Stone Mt. Abstract Co.*, 137 Ga. App. 597, 224 S.E.2d 519 (1976); *Delta Airlines v. Woods*, 137 Ga. App. 693, 224 S.E.2d 763 (1976); *Chilivis v. Dasher*, 236 Ga. 669, 225 S.E.2d 32 (1976); *Henderson v. Metropolitan Atlanta Rapid Transit Auth.*, 236 Ga. 849, 225 S.E.2d 424 (1976); *Taylor v. Taylor*, 138 Ga. App. 284, 226 S.E.2d 84 (1976); *Moore v. Rowe*, 238 Ga. 373, 233 S.E.2d 355 (1977); *Ross v. State*, 238 Ga. 445, 233 S.E.2d 381 (1977); *Rothstein v. First Nat'l Bank*, 141 Ga. App. 526, 233 S.E.2d 802 (1977); *Tingle v. Cate*, 142 Ga. App. 467, 236 S.E.2d 127 (1977); *Colodny v. Dominion Mtg. & Realty Trust*, 142 Ga. App. 730, 236 S.E.2d 917 (1977); *International Paper Co. v. Kight*, 239 Ga. 551, 238 S.E.2d 88 (1977); *Lexington Developers, Inc. v. O'Neal Constr. Co.*, 143 Ga. App. 440, 238 S.E.2d 770 (1977); *Parnell v. Etowah Bank*, 144 Ga. App. 794, 242 S.E.2d 487 (1978); *Dunn v. Royal Indem. Co.*, 145 Ga. App. 427, 243 S.E.2d 630 (1978); *Paul v. Bennett*, 241 Ga. 158, 244 S.E.2d 9 (1978); *Smith v. Smith*, 145 Ga. App. 816, 244 S.E.2d 917 (1978); *Cooper v. Public Fin.*



Corp., 146 Ga. App. 250, 246 S.E.2d 684 (1978); *Madison, Ltd. v. Price*, 146 Ga. App. 837, 247 S.E.2d 523 (1978); *Cooper v. Mercantile Nat'l Bank*, 147 Ga. App. 136, 248 S.E.2d 201 (1978); *Prince v. Prince*, 147 Ga. App. 686, 250 S.E.2d 21 (1978); *Kight v. Kight*, 242 Ga. 563, 250 S.E.2d 451 (1978); *P & J Truck Lines v. Canal Ins. Co.*, 148 Ga. App. 3, 251 S.E.2d 72 (1978); *Roberts v. Tomlinson, Inc.*, 242 Ga. 804, 251 S.E.2d 543 (1979); *McBride v. Chilivis*, 149 Ga. App. 603, 255 S.E.2d 80 (1979); *Pace v. Merck*, 149 Ga. App. 807, 256 S.E.2d 73 (1979); *Harris v. Harris*, 149 Ga. App. 842, 256 S.E.2d 86 (1979); *Land v. Sellers*, 150 Ga. App. 83, 256 S.E.2d 629 (1979); *Kellos v. Parker-Sharpe, Inc.*, 245 Ga. 130, 263 S.E.2d 138 (1980); *Federal Deposit Ins. Corp. v. Windland Co.*, 245 Ga. 194, 264 S.E.2d 11 (1980); *McCarthy v. Holloway*, 245 Ga. 710, 267 S.E.2d 4 (1980); *Durden v. Barron*, 155 Ga. App. 529, 271 S.E.2d 667 (1980); *Hill v. Wooten*, 247 Ga. 737, 279 S.E.2d 227 (1981); *Graves v. American Alloy Steel, Inc.*, 160 Ga. App. 378, 287 S.E.2d 94 (1981); *Childers v. Tauber*, 160 Ga. App. 713, 288 S.E.2d 5 (1981); *Collins v. Seaboard Coast Line R.R.*, 681 F.2d 1333 (11th Cir. 1982); *Freeman v. Criterion Ins. Co.*, 693 F.2d 1021 (11th Cir. 1982); *State Farm Fire & Cas. Co. v. Sweat*, 547 F. Supp. 233 (N.D. Ga. 1982); *Cole v. Jordan*, 161 Ga. App. 409, 288 S.E.2d 260 (1982); *Landmark First Nat'l Bank v. Schwall & Heuett*, 161 Ga. App. 356, 288 S.E.2d 331 (1982); *Bailey v. Wilkes*, 162 Ga. App. 410, 291 S.E.2d 418 (1982); *Subsequent Injury Trust Fund v. Alterman Foods, Inc.*, 162 Ga. App. 428, 291 S.E.2d 758 (1982); *Howard v. State*, 163 Ga. App. 159, 293 S.E.2d 548 (1982); *East v. Pike*, 163 Ga. App. 375, 294 S.E.2d 597 (1982); *Butler v. Home Furnishing Co.*, 163 Ga. App. 825, 296 S.E.2d 121 (1982); *Lowe Eng'rs, Inc. v. Royal Indem. Co.*, 164 Ga. App. 255, 297 S.E.2d 41 (1982); *Whitaker v. Trust Co.*, 167 Ga. App. 360, 306 S.E.2d 329 (1983); *McDaniel v. Colonial Mtg. Serv. Co.*, 167 Ga. App. 717, 307 S.E.2d 279 (1983); *R.F. Parker Contracting Co. v. City of Atlanta*, 168 Ga. App. 531, 309 S.E.2d 678 (1983); *Willis v. Rauton*, 168 Ga. App. 767, 310 S.E.2d 729 (1983); *Oxendine v. Elliott*, 170 Ga. App. 422, 317 S.E.2d 555 (1984); *Flan-*

*ders v. Georgia Farm Bureau Mut. Ins. Co.*, 171 Ga. App. 188, 318 S.E.2d 794 (1984); *Davis v. First of Ga. Ins. Managers, Inc.*, 171 Ga. App. 347, 319 S.E.2d 517 (1984); *Walton Motor Sales, Inc. v. Ross*, 736 F.2d 1449 (11th Cir. 1984); *Duncan v. Ball*, 172 Ga. App. 750, 324 S.E.2d 477 (1984); *Monroe v. Lubonivic*, 174 Ga. App. 191, 329 S.E.2d 583 (1985); *Wehunt v. Wren's Cross of Atlanta Condominium Ass'n*, 175 Ga. App. 70, 332 S.E.2d 368 (1985); *Citizens Exch. Bank v. Kirkland*, 256 Ga. 71, 344 S.E.2d 409 (1986); *Charter Medical-Fayette County, Inc. v. Health Planning Agency, Inc.*, 181 Ga. App. 184, 351 S.E.2d 547 (1986); *Cole v. Smith*, 182 Ga. App. 59, 354 S.E.2d 835 (1987); *Jackson Elec. Membership Corp. v. Georgia Power Co.*, 257 Ga. 772, 364 S.E.2d 556 (1988); *NCNB Nat'l Bank v. Charlton County*, 258 Ga. 74, 365 S.E.2d 436 (1988); *Byrd v. City of Atlanta*, 683 F. Supp. 804 (N.D. Ga. 1988); *Mobley v. Hopkins*, 258 Ga. 767, 373 S.E.2d 754 (1988); *Yeomans v. Galbreath*, 259 Ga. 261, 378 S.E.2d 864 (1989); *Jones v. Powell*, 190 Ga. App. 619, 379 S.E.2d 529 (1989); *Jamison v. West*, 191 Ga. App. 431, 382 S.E.2d 170 (1989); *McCracken v. City of College Park*, 259 Ga. 490, 384 S.E.2d 648 (1989); *Majestic Dev. Corp. v. Ferman*, 259 Ga. 859, 388 S.E.2d 701 (1990); *Taylor v. Bennett*, 260 Ga. 20, 389 S.E.2d 242 (1990); *United States Fid. & Guar. Co. v. State Farm Mut. Auto. Ins. Co.*, 195 Ga. App. 14, 392 S.E.2d 574 (1990); *Justus v. Justus*, 198 Ga. App. 533, 402 S.E.2d 126 (1991); *Hunt v. Lee*, 199 Ga. App. 130, 404 S.E.2d 446 (1991); *Giles v. Evans*, 199 Ga. App. 616, 405 S.E.2d 511 (1991); *Washington v. Department of Human Resources*, 759 F. Supp. 825 (M.D. Ga. 1991); *Talbot State Bank v. City of Columbus*, 261 Ga. 850, 413 S.E.2d 194 (1992); *Davis v. Great W. Bank*, 809 F. Supp. 96 (N.D. Ga. 1992); *Block v. Woodbury*, 211 Ga. App. 184, 438 S.E.2d 413 (1993); *Pruett v. Commercial Bank*, 211 Ga. App. 692, 440 S.E.2d 85 (1994); *Sorrells Constr. Co. v. Chandler Armentrout & Roebuck*, 214 Ga. App. 193, 447 S.E.2d 101 (1994); *Austin v. Coca-Cola Co.*, 217 Ga. App. 621, 458 S.E.2d 409 (1995); *Judkins v. State*, 218 Ga. App. 767, 463 S.E.2d 362 (1995); *Centrust Mtg. Corp. v. Smith & Jenkins*, 220 Ga. App.



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394, 469 S.E.2d 466 (1996); *DOT v. Hall*, 221 Ga. App. 178, 470 S.E.2d 775 (1996); *Khamis Enterprises, Inc. v. Boone*, 224 Ga. App. 348, 480 S.E.2d 364 (1997); *Danzell v. Cannon*, 224 Ga. App. 602, 481 S.E.2d 588 (1997); *Mobley v. Sewell*, 226 Ga. App. 866, 487 S.E.2d 398 (1997); *Bradley v. Georgia Inst. of Technology*, 228 Ga. App. 216, 491 S.E.2d 453 (1997); *Allen v. King Plow Co.*, 227 Ga. App. 795, 490 S.E.2d 457 (1997); *Fulton County Tax Comm'r v. GMC*, 234 Ga. App. 459, 507 S.E.2d 772 (1998); *Birdsong v. Enforcer Prods., Inc.*, 235 Ga. App. 132, 508 S.E.2d 769 (1998); *Gibson v. Decatur Fed. Sav. & Loan Ass'n*, 235 Ga. App. 160, 508 S.E.2d 788 (1998); *Bellamy v. Sunflower Properties, Inc.*, 240 Ga. App. 647, 523 S.E.2d 659 (1999); *Smith v. Airtouch Cellular of Ga., Inc.*, 244 Ga. App. 71, 534 S.E.2d 832 (2000); *Roth v. Gulf Atl. Media of Ga., Inc.*, 244 Ga. App. 677, 536 S.E.2d 577 (2000); *Coleman v. Grimes*, 250 Ga. App. 880, 553 S.E.2d 185 (2001); *Benedict v. Snead*, 253 Ga. App. 749, 560 S.E.2d 278 (2002); *Dalton Paving & Constr., Inc. v. South Green Constr. of Ga., Inc.*, 284 Ga. App. 506, 643 S.E.2d 754 (2007); *Walker v. Walker*, 293 Ga. App. 872, 668 S.E.2d 330 (2008); *QoS Networks Ltd. v. Warburg Pincus & Co.*, 294 Ga. App. 528, 669 S.E.2d 536 (2008); *Akridge v. Silva*, 298 Ga. App. 862, 681 S.E.2d 667 (2009); *Jones v. Unified Gov't of Athens-Clarke County*, 312 Ga. App. 214, 718 S.E.2d 74 (2011); *Rimmer v. Tinch*, 324 Ga. App. 65, 749 S.E.2d 236 (2013); *Sentinel Offender Svcs., LLC v. Glover*, No. S14A1271, S14X1272, 2014 Ga. LEXIS 940 (Nov. 24, 2014).

**Same Parties and Privies**

**Final judgment or decree of a court of competent jurisdiction upon the merits concludes** the parties and their privies to the litigation, and constitutes a bar to a new action or suit upon the same cause of action either before the same or any other tribunal. *Harney v. Wright*, 80 Ga. App. 232, 55 S.E.2d 835 (1949); *Brown v. Georgia Power Co.*, 371 F. Supp. 543 (S.D. Ga. 1973), *aff'd*, 491 F.2d 117 (5th Cir.), *cert. denied*, 419 U.S. 838, 95 S. Ct. 66, 42 L. Ed. 2d 65 (1974).

**Effect on one not a party to the proceeding.** — Judgment is not conclusive as to one who was not a party to the proceeding in which the judgment was rendered, nor as to one over whom the court acquired no jurisdiction, even though the latter may be named as a party defendant in the proceeding. *Colodny v. Krause*, 141 Ga. App. 134, 232 S.E.2d 597, *cert. denied*, 434 U.S. 892, 98 S. Ct. 267, 54 L. Ed. 2d 177 (1977).

**Personal judgment cannot be obtained against a person who is not named as a party defendant** and properly served in the action. *Colodny v. Krause*, 141 Ga. App. 134, 232 S.E.2d 597, *cert. denied*, 434 U.S. 892, 98 S. Ct. 267, 54 L. Ed. 2d 177 (1977).

**Issues in a second suit are concluded as between parties and their privies** if they were made in the first suit or if, under the rules of pleading and evidence, they could have been put in issue. *Roadway Express, Inc. v. McBroom*, 61 Ga. App. 223, 6 S.E.2d 460 (1939).

**Who constitutes a "party".** — Parties are all such persons as were directly interested in the subject matter, had a right to make a defense, to adduce testimony, to cross-examine witnesses, to control the proceedings, and to appeal the judgment; privies are all persons who are represented by the parties and claim under the parties, all who are in privity with the parties, the term privity denoting mutual or successive relationship to the same rights of property. *Roberts v. Hill*, 81 Ga. App. 185, 58 S.E.2d 465 (1950); *Walka Mt. Camp, No. 565, Woodmen of World, Inc. v. Hartford Accident & Indem. Co.*, 222 Ga. 249, 149 S.E.2d 365 (1966).

Since an industrial authority was an instrumentality of a city, or an "agent" created by legislative enactment, that which was *res judicata* as to the authority was *res judicata* as to the city. *City of Macon v. Pasco Bldg. Sys.*, 191 Ga. App. 48, 380 S.E.2d 718, *cert. denied*, 493 U.S. 824, 110 S. Ct. 85, 107 L. Ed. 2d 50 (1989).

Debtor's transfer of real property to the debtor's wife, a default judgment in a lawsuit, which the trustee claimed rendered the debtor insolvent, in which the wife did not participate and which was filed after the transfer did not prove the



debtor's insolvency at the time of the transfer for purposes of former O.C.G.A. § 18-2-22(3); the wife's status as the debtor's wife, standing alone, did not establish privity with the debtor, and the judgment against the debtor did not bind the wife. *Thurmond v. Turner* (In re Turner), No. 00-72597-PWB, 2006 Bankr. LEXIS 2745 (Bankr. N.D. Ga. Sept. 19, 2006).

**Parties includes privies.** *Roberts v. Hill*, 81 Ga. App. 185, 58 S.E.2d 465 (1950); *Cincinnati, N.O. & T. Pac. Ry. v. Hilley*, 118 Ga. App. 293, 163 S.E.2d 438 (1968).

**Reason for rule.** — Reason that verdicts and judgments bind conclusively parties and privies only is because privies in blood, privies in estate, and privies in law claim under the party against whom the judgment is rendered; and they claiming those rights are, of course, bound as the original is; but as to all others, judgments are not conclusively binding, because it is unjust to bind one by any proceeding in which one had no opportunity to make a defense, to offer evidence, to cross-examine witnesses, or to appeal, if one was dissatisfied with the judgment. *Blakewood v. Yellow Cab Co.*, 61 Ga. App. 149, 6 S.E.2d 126 (1939).

**Successor to predecessor in title connotes privity.** — Party has been held to be in privity with a party to the former litigation when the party bears the relationship of successor to a predecessor in title, a cestui que trust to a trustee or quasi-trustee, a beneficiary in estate to an administrator, a principal to an agent or agent to a principal, a city to the city's treasurer; and in class actions, when a party is one of a group of municipal taxpayers or citizens in whose behalf expressly or by necessary implication the former suit was brought by a taxpayer or property owner "upon a matter of public and general interest to all other taxpayers of such political subdivision." *College Park Land Co. v. Mayor of College Park*, 48 Ga. App. 528, 173 S.E. 239 (1934).

**Test of privity** is to determine whether one has privity with another, not whether the other has privity with the one, and then assume that such privity is reciprocal. *Gilmer v. Porterfield*, 233 Ga. 671, 212 S.E.2d 842 (1975).

**General meaning of privies** includes those who claim under or in right of parties. *Blakewood v. Yellow Cab Co.*, 61 Ga. App. 149, 6 S.E.2d 126 (1939).

**Husband-wife relationship.** — If both the husband and wife are still alive, that relationship alone does not make them privies within the meaning of this section. *Russ Transp., Inc. v. Jones*, 104 Ga. App. 612, 122 S.E.2d 282 (1961).

**Attorney's lien in divorce case.** — Former spouse's action to remove an attorney's lien under O.C.G.A. § 15-19-14 was barred by collateral estoppel under O.C.G.A. § 9-12-40. The issue of the lien had been fully litigated and decided in a divorce action in which the attorney represented the other spouse, and for purposes of recovering on the lien, the attorney was the other spouse's privy. *Ruth v. Herrmann*, 291 Ga. App. 399, 662 S.E.2d 726 (2008).

In a former client's suit seeking to remove an attorney's lien obtained against the former's clients marital property, a trial court properly granted summary judgment to the attorney since the propriety of the lien had already been litigated in the divorce action and the former client never appealed or challenged that judgment and an emergency motion to have the lien removed was denied. *Ruth v. Herrmann*, 291 Ga. App. 399, 662 S.E.2d 726 (May 2, 2008).

**Those represented by a trustee** are bound by a judgment against the trustee as such, although they were not parties to the proceeding in which the judgment was rendered. *Rushing v. Sikes*, 175 Ga. 124, 165 S.E. 89 (1932).

**Effect on third persons.** — Judgment of a court of competent jurisdiction is not conclusive as to third persons. *McDonald v. Wimpy*, 204 Ga. 617, 50 S.E.2d 347 (1948).

**Third-party actions are viewed as separate and independent lawsuits.** *Fierer v. Ashe*, 147 Ga. App. 446, 249 S.E.2d 270 (1978); *Usher v. Johnson*, 157 Ga. App. 420, 278 S.E.2d 70 (1981).

**Final judgments between the parties in one third-party action** have been held to bar a subsequent third-party action between the same parties. A judgment adjudicating a claim between a



**Same Parties and Privies (Cont'd)**

third-party plaintiff and a third-party defendant is conclusive to the same extent as though rendered in independent litigation between them. *Fierer v. Ashe*, 147 Ga. App. 446, 249 S.E.2d 270 (1978); *Usher v. Johnson*, 157 Ga. App. 420, 278 S.E.2d 70 (1981).

**Separate contracts between same parties.** — O.C.G.A. § 9-12-40 does not bar subsequent litigation on a separate contract between the same parties even though the latter claim could have been joined as an independent claim in a prior action. *Nationwide-Penncraft, Inc. v. Royal Globe Ins. Co.*, 249 Ga. 687, 294 S.E.2d 529 (1982).

**Individual in privity with corporation.** — Individual claiming a legal interest in the subject matter of a contract between corporations had a mutual or successive relationship to the same rights of property as one of the contracting corporations and was therefore in privity with the corporation so as to bar the individual's claim on the contract on the grounds of *res judicata*. *Donalson v. Coca-Cola Co.*, 164 Ga. App. 712, 298 S.E.2d 25 (1982).

**Different but associated parties.** — *Res judicata* did not operate to bar an action to collect for shipments claimed in a prior suit against a company closely associated with the defendant company although the defendant's liability was derivative because there was no benefit of a judgment in favor of the company from which the defendant's liability derived and because the earlier judgment had not been satisfied. *National Carloading Corp. v. Security Van Lines*, 164 Ga. App. 850, 297 S.E.2d 740 (1982).

**State and administrator of estate.** — Punitive damages served a public interest and were intended to protect the general public, and when the state sought punitive damages in a prior suit the state did so as *parens patriae*, representing the interests of all Georgia citizens, including an administrator of a decedent's estate; the state and the administrator were privies in that prior case and, pursuant to *res judicata*, a release executed as part of a settlement of that prior case barred puni-

tive damages in a later case brought by the administrator alleging the same products liability theory. *Brown & Williamson Tobacco Corp. v. Gault*, 280 Ga. 420, 627 S.E.2d 549 (2006).

**Proceedings quasi in rem** are brought to establish status, and not to set up rights in or title to property; and judgments in such proceedings are not conclusive against third persons as to their rights in, or title to, property when the third parties have no notice or opportunity to assert their rights. *Elliott v. Adams*, 173 Ga. 312, 160 S.E. 336 (1931).

**Subsequent action by party to former action.** — While an adjudication of the same subject matter in issue in a former suit between the same parties by a court of competent jurisdiction is an end of litigation, the plaintiff is not estopped by the judgment rendered in the court of ordinary (now probate court) in a proceeding to which the plaintiff was not a party, although the plaintiff appeared as a witness therein. *McAfee v. Martin*, 211 Ga. 14, 83 S.E.2d 605 (1954).

**Presentation of claims against partners.** — It was the duty of the plaintiff to put all claims the plaintiff had against any of the plaintiff's partners or to any portion of the partnership funds before the court for adjudication, knowing that a judgment is conclusive between the same parties and their privies as to all matters put in issue, or which under rules of law might have been put in issue in the cause wherein judgment was rendered. *Camp v. Lindsay*, 176 Ga. 438, 168 S.E. 284 (1933).

**Phrase "same parties" interpreted.** — While the phrase "same parties" does not mean that all of the parties on the respective sides of the litigation in the two cases shall have been identical, it does mean that those who invoke the defense and against whom the defense is invoked must be the same. *A.R. Hudson Realty, Inc. v. Hood*, 151 Ga. App. 778, 262 S.E.2d 189 (1979), overruled on other grounds, *Merrill Lynch v. Zimmerman*, 248 Ga. 580, 285 S.E.2d 181 (1981).

**Verdicts and judgments rendered by consent of counsel** in good faith and without any fraud or violation of express instructions given by the client to the



attorney and known to the adverse party or that party's attorney are binding upon the client, the consent of counsel being in law the consent of the parties the attorneys represent. *Phoenix Properties of Atlanta, Inc. v. Umstead*, 245 Ga. 172, 264 S.E.2d 8 (1980).

**Decree in a court of equity is conclusive on all questions raised** or which could have been raised, relating to the subject matter affected by such decree, and the same will be a good cause of bar of an action subsequently brought between the same parties upon the same subject matter in a court of competent jurisdiction. *Crawford v. Baker*, 86 Ga. App. 855, 72 S.E.2d 790 (1952).

**Parties were in sufficiently adversarial relationship in prior action** to invoke the doctrine of res judicata since: (1) the defendant was a third-party defendant in the prior action, which was also commenced by the plaintiff, and filed a response to the complaint and a counterclaim against the plaintiff; and (2) the plaintiff could have asserted a claim against the defendant in the prior action, but elected not to do so. *Fedeli v. UAPA Ag. Chem., Inc.*, 237 Ga. App. 337, 514 S.E.2d 684 (1999).

**Tort action brought after exceptions to condemnation filed.** — When a limited liability company brought a tort action against a county industrial development authority after filing an exception to a special master's award in a condemnation proceeding, the trial court properly dismissed the tort action under O.C.G.A. §§ 9-2-5(a) and 9-12-40. In both the condemnation action and the tort action, the company sought a monetary award on the ground that the condemnation rendered its contract a nullity and that the condemnation action was brought in bad faith. *Coastal Water & Sewerage Co. v. Effingham County Indus. Dev. Auth.*, 288 Ga. App. 422, 654 S.E.2d 236 (2007).

### Law of the Case

**Editor's notes.** — O.C.G.A. § 9-11-60(h) abolishes the law of the case rule, generally, although providing that judgments and orders shall not be set aside or modified without just cause, and that rulings in the appellate courts shall

be binding in subsequent proceedings in that case.

**Decision by the Supreme Court is controlling** upon the judge of the trial court, as well as upon the Supreme Court when the case reaches that court a second time. The principle in the decision may be reviewed and overruled in another case between different parties, but as between the parties the decision stands as the law of the case, even though the ruling has been disapproved by the Supreme Court in a case decided before the second appearance of the case in that court. *Walden v. Nichols*, 204 Ga. 532, 50 S.E.2d 105 (1948).

**Function of law of case rule when judgment reversed.** — When a case is brought to the Court of Appeals and the judgment of the trial court is reversed, all questions as to pleadings and the effect of evidence adjudicated by the court are binding as the law of the case on that court and, on a second trial of the case, on the court below, unless additional pleadings and evidence prevail to change such adjudications. *Parker v. State*, 76 Ga. App. 238, 45 S.E.2d 692 (1947).

**Effect of failure to take exception.** — When a petition seeks both legal and equitable relief, and the legal prayers are meritorious and the equitable prayers are not, it is error to dismiss the whole action on the ground that the petition sets forth no cause of action, for the equitable relief should be stricken, leaving a cause of action for legal relief. Under this principle, the plaintiff, in a prior action, should have excepted to the court's dismissal of the whole action. Having failed to so except, that judgment became the law of the case, to the effect that the petition alleged neither an equitable nor a legal cause of action, and constitutes a bar to the present action for the legal relief only. *Zeagler v. Zeagler*, 192 Ga. 453, 15 S.E.2d 478 (1941); *Owens v. Williams*, 87 Ga. App. 238, 73 S.E.2d 512 (1952); *Ferrell v. Bell*, 90 Ga. App. 573, 83 S.E.2d 616 (1954); *Atlanta Newspapers, Inc. v. Tyler*, 104 Ga. App. 707, 122 S.E.2d 591 (1961).

Judgment of a trial court, which after a writ of error stands unreversed, or to which no exception has been taken, is the law of the case. *Ballard v. Harmon*, 202



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Ga. 603, 44 S.E.2d 260 (1947); *Poore v. Rigsby*, 207 Ga. 238, 60 S.E.2d 239 (1950); *Oliver v. Central of Ga. Ry.*, 210 Ga. 597, 81 S.E.2d 793 (1954); *Seymour v. State*, 210 Ga. 571, 81 S.E.2d 808 (1954).

**Use of motion for new trial to correct error in court's judgment.** — If a plaintiff in error relies on a so-called extraordinary motion for new trial as a proper procedure to vacate and set aside existing judgments, the plaintiff is confronted with the rule that a motion for new trial is not the proper remedy to correct an alleged error in any judgment or decree entered by a trial court and the plaintiff's motion will be denied. *Sumner v. Sumner*, 186 Ga. 390, 197 S.E. 833 (1938); *Ballard v. Harmon*, 202 Ga. 603, 44 S.E.2d 260 (1947).

**Finding conclusive.** — Trial court at a hearing to modify child support erred in relying on the father's tax returns showing his income around the time the father and mother divorced, which supported his argument that his income had not changed much in the five years between entry of the divorce decree and the mother's filing of her petition to modify child support, as the trial court's determination at the time the divorce decree was filed that the father was making considerably less than what his tax return evidence showed was conclusive on the issue of what the father's income was at the time of the divorce, especially since that figure had not been reversed or set aside since it was entered. *Hulett v. Sutherland*, 276 Ga. 596, 581 S.E.2d 11 (2003).

**Res Judicata**

**Relation to common-law rule.** — In this state, the common-law rule that res adjudicata does not extend to the trial of habeas corpus proceedings is not of force and such proceedings are subject to the provisions of this section. *Mitchem v. Balkcom*, 219 Ga. 47, 131 S.E.2d 562 (1963); *Balkcom v. Townsend*, 219 Ga. 708, 135 S.E.2d 399, cert. denied, 377 U.S. 1009, 84 S. Ct. 1939, 12 L. Ed. 2d 1055 (1964).

O.C.G.A. § 9-12-40 is a codification of Georgia's common-law rule of res judicata.

*Lawson v. Watkins*, 261 Ga. 147, 401 S.E.2d 719 (1991).

**O.C.G.A. §§ 9-12-40 and 9-12-42 set out the basic principles** of res judicata in Georgia. *Norris v. Atlanta & W.P.R.R.*, 254 Ga. 684, 333 S.E.2d 835 (1985).

**Georgia does not unswervingly adhere to a rule of mutuality** as it relates to res judicata. *Gilmer v. Porterfield*, 233 Ga. 671, 212 S.E.2d 842 (1975).

**Purpose of rule.** — Res judicata is designed to foreclose collateral attack and to insure the integrity of judgments rendered by courts of competent jurisdiction. *Brown v. Georgia Power Co.*, 371 F. Supp. 543 (S.D. Ga. 1973), aff'd, 491 F.2d 117 (5th Cir.), cert. denied, 419 U.S. 838, 95 S. Ct. 66, 42 L. Ed. 2d 65 (1974).

**Appellate review not prerequisite for judgment to act as bar to later action.** — O.C.G.A. § 9-12-40 does not require appellate review of a judgment before the statute can act as a bar to a later action and, therefore, because the superior court in the certiorari action had adjudicated the dispute, all the prerequisites for res judicata were met, and the action was barred. *McCracken v. City of College Park*, 259 Ga. 490, 384 S.E.2d 648 (1989), cert. denied, 494 U.S. 1028, 110 S. Ct. 1475, 108 L. Ed. 2d 612 (1990).

**Record on appeal incomplete.** — Trial court's order granting summary judgment to a former wife on claims by a former husband and his corporate entities that the wife stole funds in 2006 was vacated and remanded for the trial court to consider the issue of res judicata in the first instance because the claims were not actually litigated and determined in the prior contempt action, and the record on appeal was incomplete with regard to those claims; while the final judgment and decree of divorce indicated that the settlement agreement between the wife and husband addressed the division of property, the copy of the settlement agreement included in the record on appeal as part of the parties' record appendix was missing the second page, which apparently contained the property-related provisions, and it was unclear from the record whether the trial court, in resolving the wife's motion for summary judgment, had a complete copy of the settlement agree-



ment before the court or was likewise missing the second page. *Ga. Neurology & Rehab., P.C. v. Hiller*, 310 Ga. App. 202, 712 S.E.2d 611 (2011).

**Unappealed matter in debtor-creditor case.** — Unappealed order denying the debtor's motion to set aside a default judgment was *res judicata* as to the debtor and creditor in a subsequent garnishment proceeding. *Halkirk Cos. v. Dirt Busters, Inc.*, 190 Ga. App. 460, 379 S.E.2d 173, cert. denied, 190 Ga. App. 897, 379 S.E.2d 173 (1989).

**Res judicata is to be applied only when** the cause of action is the same. *Slaughter v. Slaughter*, 190 Ga. 229, 9 S.E.2d 70 (1940); *Forrester v. Southern Ry.*, 268 F. Supp. 194 (N.D. Ga. 1967).

**Identity of cause of action.** — When the plaintiff sought to recover various amounts allegedly due under the lease between the parties including unpaid rent, property taxes, insurance premiums, and amounts for construction change orders, but each of these items constituted amounts for which the plaintiff could have obtained judgment in a prior dispossessory action, there was an identity of cause of action between the two cases. *Atlanta J's, Inc. v. Houston Foods, Inc.*, 237 Ga. App. 415, 514 S.E.2d 216 (1999).

After the appeals court found that both the magistrate action and the action on appeal concerned a condominium association's failure to maintain the condominium complex in accordance with its by-laws and standards, and a claim for injunctive relief, because any related claim for injunctive relief later filed against the association could have been asserted before the magistrate, *res judicata* applied to the related claim, and the fact that the magistrate court lacked subject matter jurisdiction to provide equitable relief was immaterial. *Green v. Bd. of Dirs. of Park Cliff Unit Owners Ass'n*, 279 Ga. App. 567, 631 S.E.2d 769 (2006).

**Adjudication on the merits.** — As the plaintiff clearly could have pursued a claim for past due rents and other amounts due under the lease between the parties in a prior dispossessory action, but elected not to do so, the final judgment of the magistrate court in the prior action

operated as an adjudication on the merits of such claim for purposes of *res judicata*. *Atlanta J's, Inc. v. Houston Foods, Inc.*, 237 Ga. App. 415, 514 S.E.2d 216 (1999).

Because a commercial landlord had dismissed its prior disposssession action against a tenant upon payment by the tenant pursuant to a settlement of the amount due and owing and such dismissal did not indicate that it was with prejudice, it was deemed without prejudice and was accordingly not an adjudication on the merits pursuant to O.C.G.A. § 9-11-41(b); accordingly, it was error for the trial court to have barred the landlord's claim for common area maintenance charges in the landlord's second action on the ground of *res judicata* as the requirement of a previous adjudication on the merits of the claim was not met pursuant to O.C.G.A. § 9-12-40. *Rafizadeh v. KR Snellville, LLC*, 280 Ga. App. 613, 634 S.E.2d 406 (2006).

Dismissal of a complaint for want of prosecution was not an adjudication on the merits; thus, collateral estoppel and *res judicata* did not bar a subsequent complaint. *Valdez v. R. Constr., Inc.*, 285 Ga. App. 373, 646 S.E.2d 329 (2007).

Because a prior order entered in a suit between a payor and a payee was a final adjudication of the payee's quantum meruit claim, and the payee did not appeal from that aspect of the order, that order acted as *res judicata* and could not be raised again in the instant suit. *ChoicePoint Servs. v. Hiers*, 284 Ga. App. 640, 644 S.E.2d 456 (2007), cert. denied, 2007 Ga. LEXIS 499 (Ga. 2007).

In an action by a client against the client's former attorney, the client was estopped by *res judicata* from seeking further judicial review of a 2005 order; the client filed an application for discretionary review of the 2005 order, which the Supreme Court of Georgia denied on its merits. *Hook v. Bergen*, 286 Ga. App. 258, 649 S.E.2d 313 (2007), cert. denied, 2007 Ga. LEXIS 697 (Ga. 2007).

Trial court did not err in entering summary judgment in favor of a grantor's grandsons in an action filed by the grantor's wife, daughter, and granddaughter challenging the validity of a quitclaim deed because *res judicata* compelled sum-



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mary judgment on the counts alleging cloud on title, undue influence, and mistake of fact since there was an identity of the parties, and a decision of the court of appeals in a prior appeal upholding the trial court's grant of summary judgment constituted an adjudication on the merits; the causes of action raised in the amended complaint were matters put in issue or which under the rules of law could have been put in issue in the original complaint. *Smith v. Lockridge*, 288 Ga. 180, 702 S.E.2d 858 (2010).

Because the counterclaim-plaintiffs in the second-dismissed case were not plaintiffs in the first-dismissed case, the second dismissal did not operate as an adjudication upon the merits under O.C.G.A. § 9-11-41(a)(3). Consequently, O.C.G.A. § 9-12-40 did not preclude the instant action, and the trial court erred in dismissing the action on that ground. *Dillard Land Invs., LLC v. S. Fla. Invs., LLC*, 320 Ga. App. 209, 739 S.E.2d 696 (2013).

Drug store's voluntary dismissal of the store's inverse condemnation suit with prejudice barred the store's damages claim against a state agency in a direct condemnation action based on res judicata and the purported mistake of dismissing with prejudice was not subject to correction under O.C.G.A. § 9-11-60. *DOT v. Revco Disc. Drug Ctrs., Inc.*, 322 Ga. App. 873, 746 S.E.2d 631 (2013).

**Opportunity to litigate issues in prior suit.** — Plaintiff's action, seeking to litigate whether the defendant had valid title to property from a tax sale, was not barred by res judicata because under O.C.G.A. § 44-7-9 the plaintiff did not have the opportunity in the prior dispossessory proceeding in magistrate court to litigate title issues. *Myers v. North Ga. Title & Tax Free Exchange, LLC*, 241 Ga. App. 379, 527 S.E.2d 212 (1999).

Brokerage service account owner's assignee's claims against the service that it had unlawfully allowed disbursement of the funds in the account, pursuant to a garnishment judgment, after the owner had sought to close the account, were barred by res judicata under O.C.G.A.

§ 9-12-40 since it was noted that the owner had filed a traverse in the garnishment proceeding and, accordingly, the owner could have raised the same issues at that time, pursuant to O.C.G.A. § 18-4-93. The owner, as the debtor in the garnishment proceeding, was required to assert any claim that the owner's right to the funds was superior to that of the judgment creditor, pursuant to O.C.G.A. § 18-4-95. *Lamb v. First Union Brokerage Servs.*, 263 Ga. App. 733, 589 S.E.2d 300 (2003).

Buyer had no separate right to counterclaims which the buyer had asserted in a prior suit since the buyer had filed bankruptcy since the time the counterclaims were asserted; the counterclaims thus belonged to the buyer's bankruptcy estate and so the bankruptcy trustee was authorized to dismiss them; res judicata barred the buyer from asserting the same claims in a later suit based on the dismissal of the counterclaims in the prior suit by the bankruptcy trustee. *Lee v. Owenby & Assocs.*, 279 Ga. App. 446, 631 S.E.2d 478 (2006).

Superior court properly upheld a second ALJ's ruling that an employer was foreclosed from raising a claim for a credit for 20 weeks of wages already paid to the claimant, under O.C.G.A. § 34-9-243, as the employer was entitled to raise the issue no later than ten days prior to the original compensation hearing, and that issue could and should have been adjudicated, but was not, making the issue res judicata. *Vought Aircraft Indus. v. Faulds*, 281 Ga. App. 338, 636 S.E.2d 75 (2006).

Claim by a company for fraud against a debtor brought for the first time in an adversary proceeding was barred by the doctrine of res judicata because the claim could have been brought in an earlier district court proceeding involving the same parties and the same facts. *Omega Cotton Co. v. Sutton (In re Sutton)*, No. 07-06006, 2008 Bankr. LEXIS 2593 (Bankr. M.D. Ga. Oct. 2, 2008).

Doctrine of res judicata, O.C.G.A. § 9-12-40, did not preclude a wife from bringing an action for damages based on her former husband's breach of a settlement agreement that had been incorporated into a court order because such a



claim was separate and apart from a contempt action she brought based on his violation of the order. *Jacob-Hopkins v. Jacob*, 304 Ga. App. 604, 697 S.E.2d 284 (2010).

**How to raise res judicata question.** — Question of res judicata must be raised by a plea to that effect and cannot be raised by demurrer (now motion to dismiss) when the facts do not appear in the petition. *Owens v. Williams*, 87 Ga. App. 238, 73 S.E.2d 512 (1952).

**Certified copies of record portions** are required for proof of res judicata. *Mayer v. Wylie*, 229 Ga. App. 282, 494 S.E.2d 60 (1997).

**Under res judicata, a proper court's judgment is conclusive** between the same parties and their privies as to all matters put in issue, or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered, until such judgment is reversed or set aside. *Camp v. Lindsay*, 176 Ga. 438, 168 S.E. 284 (1933); *Scarborough v. Edgar*, 176 Ga. 574, 168 S.E. 592 (1933), overruled on other grounds, *Jones v. Dean*, 188 Ga. 319, 3 S.E.2d 894 (1939); *Miles v. Johnson*, 193 Ga. 492, 18 S.E.2d 831 (1942); *Hubbard v. Whatley*, 200 Ga. 751, 38 S.E.2d 738 (1946); *C. Schomburg & Son v. Schaefer*, 218 Ga. 659, 129 S.E.2d 854 (1963); *Booker v. Booker*, 107 Ga. App. 339, 130 S.E.2d 260 (1963); *Williams v. Metropolitan Home Imp. Co.*, 110 Ga. App. 770, 140 S.E.2d 56 (1964); *Brown v. Georgia Power Co.*, 371 F. Supp. 543 (S.D. Ga. 1973), aff'd, 491 F.2d 117 (5th Cir.), cert. denied, 419 U.S. 838, 95 S. Ct. 66, 42 L. Ed. 2d 65 (1974). *Patrick v. Simon*, 237 Ga. 742, 229 S.E.2d 746 (1976).

**Requirement that court have competent jurisdiction.** — It is fundamental that the legal liability of one person to another person can be ascertained only in an action brought against such person by the other in a court of competent jurisdiction. *Colodny v. Krause*, 141 Ga. App. 134, 232 S.E.2d 597, cert. denied, 434 U.S. 892, 98 S. Ct. 267, 54 L. Ed. 2d 177 (1977).

**Identity of parties.** — It is not required that all the parties in the two cases shall have been identical, but it is sufficient as to identity of parties if those by and against whom the defense of res

judicata is invoked in the latter case were real parties at interest or privies as to the controversy in the former case. *Darling Stores Corp. v. Beatus*, 199 Ga. 215, 33 S.E.2d 701 (1945); *Waggaman v. Franklin Life Ins. Co.*, 265 Ga. 565, 458 S.E.2d 826 (1995).

Trial court erred in granting a limited liability company summary judgment in the company's ejectment action against a property owner on the ground of res judicata under O.C.G.A. § 9-12-40 because there remained a question of fact regarding whether the owner was a party to the prior action; the owner asserted and presented affidavit evidence supporting the claim that the trial court in the quiet title action lacked personal jurisdiction over the owner, thus creating a genuine issue of material fact regarding whether the owner was a party to the earlier litigation. *James v. Intown Ventures, LLC*, 290 Ga. 813, 725 S.E.2d 213 (2012).

**No privity between plaintiffs.** — In a suit brought by the plaintiff alleging a violation of the Georgia Open Records Act, O.C.G.A. § 50-18-70 et seq., the trial court erred in finding that the doctrine of res judicata barred the plaintiff's action because there was no privity between the plaintiffs in the prior lawsuit and the current action. *Sampson v. Ga. Dep't of Juvenile Justice*, 328 Ga. App. 733, 760 S.E.2d 203 (2014).

**To prove a res judicata defense,** a litigant need introduce only those parts of the record of the prior proceeding which are necessary to prove the defense. *Boozar v. Higdon*, 252 Ga. 276, 313 S.E.2d 100 (1984); *Waggaman v. Franklin Life Ins. Co.*, 265 Ga. 565, 458 S.E.2d 826 (1995).

**Application of doctrine of res judicata may benefit plaintiff;** if, for instance, the unsuccessful defendant in the prior suit wants to contest liability upon the judgment there rendered, and the plaintiff sets up the doctrine of res judicata and the conclusiveness of the judgment. *Usher v. Johnson*, 157 Ga. App. 420, 278 S.E.2d 70 (1981).

**Interest on child support arrearages.** — When the issue of interest on past due child support was not put in issue and decided in a prior contempt proceeding related to a father's failure to



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pay child support, res judicata did not bar a subsequent judgment for interest on the past due child support amounts; it is undisputed that O.C.G.A. § 7-4-12.1 applies retroactively. *Dial v. Adkins*, 265 Ga. App. 650, 595 S.E.2d 332 (2004).

**Issues which could have been litigated in first suit barred.** — Georgia law of res judicata bars a second suit between the same parties involving not only those issues that were actually litigated, but in addition all issues which could have been litigated in the first suit between the parties. *Wilson v. Auto-Owners Ins. Co.*, 791 F.2d 886 (11th Cir. 1986).

**Subject matter not identical in bank's action to recover.** — Res judicata did not bar a bank's action against guarantors to recover the outstanding balances owed on promissory notes a development company executed because the subject matters in the bank's action and an action condominium owners filed against the company and the bank, which filed a third-party-complaint against the guarantors, were not identical; the owners' action concerned the company's breach of the company's obligations under mortgage documents, which triggered the guarantors' obligation to indemnify the bank for the cost of the litigation, and the bank's action concerned the guarantors' breach of their contractual obligation to repay the company's debt. *Baxter v. Fairfield Fin. Servs.*, 307 Ga. App. 286, 704 S.E.2d 423 (2010).

**Claim for wrongful foreclosure was logically related to out-of-state action** to collect on the same note, it was incumbent upon the plaintiff to file the plaintiff's compulsory counterclaim in that court, and the plaintiff's failure to do so precluded the plaintiff from attempting to recover in Georgia, the plaintiff's claim correctly being determined by the trial court to be barred by res judicata. *Willis v. National Mtg. Co.*, 235 Ga. App. 544, 509 S.E.2d 403 (1998).

**Different legal theory to recover for same wrong not permitted.** — Doctrine of res judicata will not permit one who first sought, unsuccessfully, to recover for

a wrong under a contractual theory to later seek to employ a tort theory to recover for that same wrong. *Garrett v. Transus, Inc.*, 177 Ga. App. 844, 341 S.E.2d 494 (1986); *Helmuth v. Life Ins. Co.*, 391 Ga. App. 574, 391 S.E.2d 412 (1990); *Garrett v. Life Ins. Co.*, 221 Ga. App. 315, 471 S.E.2d 262 (1996).

When victims of a fraudulent scheme who sued the perpetrator of the fraud under the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., had previously unsuccessfully sued the perpetrator for fraud and related claims, judgment n.o.v. was properly entered in favor of the perpetrator because the victims' claim was barred by res judicata and collateral estoppel as it should have been raised in their previous suits against the perpetrator which involved the same parties and the same subject matter. *Austin v. Cohen*, 268 Ga. App. 650, 602 S.E.2d 146 (2004).

Despite a payee's argument that a reformation claim could not have previously been filed because neither party foresaw that a contract claim could have been disposed of as it was, the argument was rejected as spurious, and because this argument ignored the fact that the payee filed a prior quantum meruit claim, which was predicated on the lack of an enforceable contract; hence, the payor obviously anticipated that the contract might not be entirely enforceable, and having done so, could have recognized the need to bring a reformation claim in the earlier action. *ChoicePoint Servs. v. Hiers*, 284 Ga. App. 640, 644 S.E.2d 456 (2007), cert. denied, 2007 Ga. LEXIS 499 (Ga. 2007).

**In order for the doctrine of res judicata to apply**, or for a party to take advantage of the doctrine in a subsequent suit brought against that party after the termination of the first, there are three prerequisites to which the situation must conform. They are: (1) identity of parties; (2) identity of the cause of action; and (3) adjudication by a court of competent jurisdiction. All of these elements must concur. *House v. Benton*, 42 Ga. App. 97, 155 S.E. 47 (1930); *Edwards v. Carlton*, 98 Ga. App. 230, 105 S.E.2d 372 (1958); *Lewis v. Price*, 104 Ga. App. 473, 122 S.E.2d 129 (1961); *Life & Cas. Ins. Co. v. Webb*, 122 Ga. App.



344, 145 S.E.2d 63 (1965); *Cincinnati, N.O. & T. Pac. Ry. v. Hilley*, 118 Ga. App. 293, 163 S.E.2d 438 (1968); *Lowe v. American Mach. & Foundry Co.*, 132 Ga. App. 572, 208 S.E.2d 585 (1974); *Janelle v. Seaboard Coast Line R.R.*, 524 F.2d 1259 (5th Cir. 1975); *Firestone Tire & Rubber Co. v. Pinyan*, 155 Ga. App. 343, 270 S.E.2d 883 (1980); *Barnes v. City of Atlanta*, 186 Ga. App. 187, 366 S.E.2d 822 (1988); *Crowe v. Congress Fin. Corp.*, 196 Ga. App. 36, 395 S.E.2d 321 (1990); *Akin v. PAFEC Ltd.*, 991 F.2d 1550 (11th Cir. 1993).

In order for the principles of res judicata to apply so as to bind a plaintiff as to any theory of the plaintiff's claim, the cause of action in both cases must be the same. *Greyhound Lines v. Cobb County*, 523 F. Supp. 422 (N.D. Ga. 1981), *aff'd*, 681 F.2d 1327 (11th Cir. 1982).

One must assert all claims for relief concerning the same subject matter in one lawsuit, and any claims for relief concerning that same subject matter which are not raised will be res judicata pursuant to O.C.G.A. § 9-12-40. *Lawson v. Watkins*, 261 Ga. 147, 401 S.E.2d 719 (1991); *Norman v. Farm Fans, Inc.*, 203 Ga. App. 97, 416 S.E.2d 374 (1992).

**Action under Quiet Title Act barred additional action.** — Trial court did not err in ruling that a church's prior quia timet action under the Quiet Title Act, O.C.G.A. § 23-3-60 et seq., barred an heir's action against the church seeking title to the property because the prior action settled the church's ownership interest in the property. *Cartwright v. First Baptist Church of Keysville, Inc.*, 316 Ga. App. 299, 728 S.E.2d 893 (2012).

**Applicable to habeas courts.** — Principle of res judicata contained in O.C.G.A. § 9-12-40 applies to the rulings and findings of habeas courts. *Martin v. State*, 228 Ga. App. 548, 492 S.E.2d 307 (1997).

Judgment of the trial court denying the defendant's motion for new trial and the court's conclusion that affidavits were not newly discovered evidence but were cumulative of evidence presented at trial and the amended motion for new trial was res judicata and binding on the habeas court. *Walker v. Penn*, 271 Ga. 609, 523 S.E.2d 325 (1999).

**Effect of new factual allegations.** — Doctrine of res judicata will bar an action even if some new factual allegations have been made. *Williams v. Summit Psychiatric Ctrs.*, 185 Ga. App. 264, 363 S.E.2d 794 (1987), cert. denied, 185 Ga. App. 911, 363 S.E.2d 794 (1988).

**Joinder of separate causes of action.** — Rules governing res judicata do not compel one to join separate causes of action in order to escape the penalties of that doctrine. In order for the principles of res judicata to apply so as to bind a plaintiff as to any theory of the plaintiff's claim whether invoked or not, the cause of action in both cases must be the same. *Spence v. Erwin*, 200 Ga. 672, 38 S.E.2d 394 (1946).

When a plaintiff has multiple dealings with a defendant, the law does not require that the plaintiff assert every separate claim for relief that the plaintiff may have against the defendant in one single lawsuit or risk losing the claim for relief forever, as would be the case if the joinder statute provided for mandatory rather than permissive joinder. Instead, the law requires that such a plaintiff must bring every claim for relief the plaintiff has concerning the same subject matter in one lawsuit. The plaintiff may join several claims for relief arising out of different subject matters in one lawsuit but the plaintiff is not required to do so and will not be penalized for making a strategic decision to the contrary. *Lawson v. Watkins*, 261 Ga. 147, 401 S.E.2d 719 (1991).

**Theory of virtual representation.** — Doctrine of res judicata will not be applied on the theory of virtual representation when the original action is brought by a stranger to the subsequent action solely on the stranger's own behalf to protect the stranger's individual rights. *Humthlett v. Reeves*, 211 Ga. 210, 85 S.E.2d 25 (1954).

**Presumptions as to judgments regular on judgments' face.** — When a judgment is regular on the judgment's face, the presumption is that there was sufficient evidence to authorize the judgment, and the judgment is conclusive as to the subject matter which it purports to decide until it is reversed or impeached for fraud; it cannot be attacked collaterally on



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account of any error or want of regularity in its exercise. *Rowell v. Rowell*, 214 Ga. 377, 105 S.E.2d 19 (1958).

**Effect of irregular or erroneous judgment.** — When a court has jurisdiction, the court has a right to decide every question which occurs in the cause, and whether the court's decision is correct or otherwise, the court's judgment until reversed is regarded as binding in every other court. *McRae v. Boykin*, 73 Ga. App. 67, 35 S.E.2d 548 (1945), cert. denied, 328 U.S. 844, 66 S. Ct. 1024, 90 L. Ed. 1618 (1946); *Mitchell v. Arnall*, 203 Ga. 384, 47 S.E.2d 258 (1948); *Bentley v. Buice*, 102 Ga. App. 101, 115 S.E.2d 706 (1960).

Judgment of a court of competent jurisdiction, however irregular or erroneous, is binding until set aside. *Morgan v. Department of Offender Rehabilitation*, 166 Ga. App. 611, 305 S.E.2d 130 (1983).

**Irregular judgment defined.** — Irregular judgment is one that is entered contrary to the manner of practice and procedure allowed by law in some material respect; after jurisdiction is once attached, mere errors or irregularities in the proceedings, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void. *Rowell v. Rowell*, 214 Ga. 377, 105 S.E.2d 19 (1958).

**When res judicata effect of issues cease.** — Issues which are made, or which under the rules of law could have been made in the cause, cease to be res judicata when the judgment therein rendered is set aside in a court of competent jurisdiction. *Saliba v. Saliba*, 202 Ga. 279, 42 S.E.2d 748 (1947).

**Motion to revive original judgment.** — When a defendant is served, appears, and pleads in the original suit, a defendant cannot inquire into the merits of the original judgment on a writ to revive the judgment. It is not error to sustain a demurrer (now motion to dismiss) and strike the defendant's answer in such a proceeding. *McRae v. Boykin*, 73 Ga. App. 67, 35 S.E.2d 548 (1945), cert. denied, 328 U.S. 844, 66 S. Ct. 1024, 90 L. Ed. 1618 (1946).

**Offering in defense to scire facias evidence existing prior to judgment.**

— On the general principle of res adjudicata, which applies equally to proceedings by scire facias as to any other action, and on the further ground that this method of reviving a judgment is merely a supplementary step in the original action, the defendant is absolutely precluded from going behind the judgment and offering in defense to the scire facias any matter which existed before the rendition of the original judgment and might have been presented in the former proceeding. *McRae v. Boykin*, 73 Ga. App. 67, 35 S.E.2d 548 (1945), cert. denied, 328 U.S. 844, 66 S. Ct. 1024, 90 L. Ed. 1618 (1946).

**State court's disposition of federal constitutional questions.** — State courts are competent to decide federal constitutional questions and a state court determination upon the merits of such issues is res judicata absent an appeal through the state appellate system and ultimately to the United States Supreme Court. *Brown v. Georgia Power Co.*, 371 F. Supp. 543 (S.D. Ga. 1973), aff'd, 491 F.2d 117 (5th Cir.), cert. denied, 419 U.S. 838, 95 S. Ct. 66, 42 L. Ed. 2d 65 (1974).

State court's foreclosure of the constitutional issue is res judicata upon the merits of the substantive issue as well as the procedural question concerning the method of entry of judgment. *Brown v. Georgia Power Co.*, 371 F. Supp. 543 (S.D. Ga. 1973), aff'd, 491 F.2d 117 (5th Cir.), cert. denied, 419 U.S. 838, 95 S. Ct. 66, 42 L. Ed. 2d 65 (1974).

In a 42 U.S.C. § 1983 case arising from a traffic accident in which a driver had previously filed a state case, a federal district court did not err by granting summary judgment on the driver's claims on the basis of res judicata under O.C.G.A. § 9-12-40. The state court had issued a decision on the merits of the driver's claims, the driver conceded that the state court was a court of competent jurisdiction that could have decided the § 1983 claims, and the driver's contention that a litigant was not required to assert federal claims in state court was without merit. *Endsley v. City of Macon*, No. 08-13279, 2008 U.S. App. LEXIS 24003 (11th Cir. Nov. 20, 2008) (Unpublished).



**Pendent state claim retained by federal court.** — If a federal court would have retained jurisdiction of a pendent state claim had the claim been raised, then a subsequent action in state court would be barred by res judicata. *Pope v. City of Atlanta*, 240 Ga. 177, 240 S.E.2d 241 (1977); *Hardy v. Georgia Baptist Health Care Sys.*, 239 Ga. App. 596, 521 S.E.2d 632 (1999).

**Relationship of claims in state action to prior federal action.** — After a brokerage firm was found not guilty of violating the Securities Exchange Act of 1934 in a federal action, subsequent claims of negligence and breach of fiduciary duty brought in a state court are barred under O.C.G.A. § 9-12-40 as these claims ought to have been litigated in the federal action. *NcNeal v. Paine, Webber, Jackson & Curtis, Inc.*, 249 Ga. 662, 293 S.E.2d 331 (1982).

Trial court did not err in granting summary judgment to a city in a police officer's suit on the basis that, pursuant to the doctrine of res judicata, a prior federal action by the police officer barred the police officer's claims regarding the city's failure to promote the police officer on two occasions in 2004 promotions; however, the police officer's claims based on the failure to promote in December 2005 and November 2006 were not barred by res judicata because the city did not meet the city's burden of affirmatively establishing that the police officer could have raised these claims, which were based on separate events, in the federal case. Thus, the trial court erred in granting summary judgment to the city as to the 2005 and 2006 promotions. *Neely v. City of Riverdale*, 298 Ga. App. 884, 681 S.E.2d 677 (2009), cert. denied, No. S09C1925, 2010 Ga. LEXIS 28 (Ga. 2010).

**Rationale for not applying res judicata.** — When it does not apply the res judicata statute, the court must be convinced that the underlying purposes of the res judicata rule are advanced rather than defeated by not applying the rule. *Pope v. City of Atlanta*, 240 Ga. 177, 240 S.E.2d 241 (1977).

**State court must apply same rules used by federal court.** — When state claims which "could have been raised" in

federal litigation would have been pendent had they been presented to the federal court, the state court, in applying its res judicata statute, will use the same rules that the federal court would have used in determining whether it would exercise pendent jurisdiction. *Pope v. City of Atlanta*, 240 Ga. 177, 240 S.E.2d 241 (1977).

**Attempt to relitigate federal court dismissal of federal statutory action.**

— Federal district court's dismissal of a case with prejudice, on the grounds that a federal antidiscrimination statute cannot be applied against the states, is an adjudication on the merits, and not a jurisdictional disposition. Accordingly, the litigant is barred from relitigating the matter in state court. Similarly, a claim against the state alleging a violation of the federal civil rights statute, 42 U.S.C. § 1983, is barred by the doctrine of res judicata, because it could and should have been presented to the original federal court. *Morgan v. Department of Offender Rehabilitation*, 166 Ga. App. 611, 305 S.E.2d 130 (1983).

**Using federal civil rights act to attack state judgments.** — Civil Rights Act, 42 U.S.C. §§ 1971 et seq., 1983, is not a vehicle for attack upon final state court judgments. *Brown v. Georgia Power Co.*, 371 F. Supp. 543 (S.D. Ga. 1973), aff'd, 491 F.2d 117 (5th Cir.), cert. denied, 419 U.S. 838, 95 S. Ct. 66, 42 L. Ed. 2d 65 (1974).

**Attacks on original judgments in alimony cases.** — Under doctrine of res judicata, a party is not estopped from questioning the validity of an earlier judgment granting temporary alimony when the original judgment, rendered in a previous litigation between the same parties, was based upon a different cause of action from a subsequent proceeding for contempt. *Powell v. Powell*, 200 Ga. 379, 37 S.E.2d 191 (1946).

Party is not estopped from questioning the validity of an earlier judgment granting temporary alimony under the doctrine of res judicata since the original judgment, rendered in previous litigation between the same parties, was based upon a different cause of action from a subsequent proceeding for contempt. *Powell v.*



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Powell, 200 Ga. 379, 37 S.E.2d 191 (1946).

**Second action for divorce based on different acts from first action.** —

Party who has once filed an action for divorce on the ground of cruel treatment, which suit resulted in a verdict and decree adverse to the libelant, is not barred from thereafter filing a second petition on the same ground, but based on different acts, all of which were committed since the date of the former trial. *Slaughter v. Slaughter*, 190 Ga. 229, 9 S.E.2d 70 (1940).

**Prior judgment vesting custody of minor in mother.** — When custody of a minor child was vested in the mother by prior judgment, it was conclusive against the father and was res judicata in habeas corpus proceeding by father. *Levens v. Edge*, 217 Ga. 418, 122 S.E.2d 728 (1961).

**Deprivation proceedings.** — Unappealed deprivation orders of the juvenile court may be used to establish that the children were deprived (now “dependent”) within the meaning of former O.C.G.A. § 15-11-94(b)(4)(A)(i) (see now O.C.G.A. §/15 11-310); since the parents did not appeal the deprivation decision regarding their children, they were bound by the determination that their children were deprived (now “dependent”) under O.C.G.A. §§ 9-12-40 and 9-12-42. In the Interest of C.M., 258 Ga. App. 387, 574 S.E.2d 433 (2002).

**Issue of legitimacy of a child.** — Legitimacy of a child is a matter for decision during the divorce proceedings. This issue is res judicata and cannot be raised in a subsequent proceeding to modify the divorce decree. *Roberson v. Fooster*, 234 Ga. 444, 216 S.E.2d 273 (1975).

When the legitimacy of a child was recognized in prior divorce proceedings, from which no appeal was taken, that issue was res judicata and could not be raised by the mother in a paternity action in which she sought adjudication that a man other than her former husband was the father of the child. *Macuch v. Pettey*, 170 Ga. App. 467, 317 S.E.2d 262 (1984).

When a divorce decree reflected a finding that the defendant was the child’s natural father, the issue of paternity could not be relitigated in a subsequent con-

tempt action against a defendant to recover child support arrearage. *Department of Human Resources v. Hambrick*, 216 Ga. App. 606, 455 S.E.2d 120 (1995).

**Paternity action not barred by prior adjudication in action to recover support payments.** — Paternity action, where blood tests appeared to establish that the prospective father was the biological father of the child was not barred by a prior adjudication in an action brought by the Department of Human Resources to recover the sum expended on behalf of the child, in which a third party acknowledged paternity of the child, under principles of res judicata or collateral estoppel. *Miller v. Charles*, 211 Ga. App. 386, 439 S.E.2d 88 (1993).

When an order of dismissal entered in a previous Uniform Reciprocal Enforcement of Support Action expressly stated that the issue of paternity was not decided, the issue was not res judicata. *Department of Human Resources v. Gelinas*, 216 Ga. App. 561, 455 S.E.2d 76 (1995).

**Divorce decree determined paternity.** — When a final judgment and decree entered in a divorce action established that the defendant was the father of the minor child and set forth visitation rights and child support obligations, this prior judgment constituted a binding determination of paternity so that the defendant is barred by the doctrine of res judicata from again litigating the issue of paternity. *Department of Human Resources v. Hurst*, 208 Ga. App. 792, 432 S.E.2d 236 (1993).

**Divorce decree determined ownership of insurance policy.** — Res judicata applied to bar husband’s action seeking reformation of a life insurance policy to show him as owner when the husband had the opportunity to litigate that issue in the divorce proceeding wherein the policy was awarded to his wife. *Waggaman v. Franklin Life Ins. Co.*, 265 Ga. 565, 458 S.E.2d 826 (1995).

**Estoppel from setting aside accepted benefits of divorce decree.** — Party litigant who accepts benefits under a divorce decree is estopped to set the decree aside. *Guess v. Guess*, 242 Ga. 786, 248 S.E.2d 528 (1979).

**Jury needed to settle issue of res judicata.** — A court is not authorized to



settle the issue raised in a proper plea of *res adjudicata* without the intervention of a jury, though, in a proper case, it might direct a verdict. *Davenport v. Southern Ry.*, 42 Ga. App. 160, 155 S.E. 340 (1930).

**Court properly sustained a plea of *res judicata*** when in a former suit between the same parties in the same court, concerning the same cause of action, a petition identical in language was dismissed on general demurrer (now motion to dismiss) on the ground that the petition set forth no cause of action, and the judgment sustaining the demurrer in the previous case was not excepted to. *Sudderth v. Harris*, 51 Ga. App. 654, 181 S.E. 122 (1935); *Smith v. Bird*, 189 Ga. 105, 5 S.E.2d 336 (1939); *Owens v. Williams*, 87 Ga. App. 238, 73 S.E.2d 512 (1952); *Smith v. Southeastern Courts, Inc.*, 89 Ga. App. 789, 81 S.E.2d 226 (1954); *Dykes v. Dykes*, 214 Ga. 288, 104 S.E.2d 430 (1958).

*Res judicata* barred a teacher's second action against a school district arising from the teacher's claims that the district breached the parties' agreement as to the teacher's resignation and that the agreement was fraudulently induced by the district, as there was identity of parties and subject matter between the two actions, and the teacher had an opportunity in the first action to fully litigate the issues on the merits; although the first action named the "Rome City Schools," the school system had vigorously defended that action and there was identity with the school district, which was the named party in the second action. *Kaylor v. Rome City Sch. Dist.*, 267 Ga. App. 647, 600 S.E.2d 723 (2004).

Widower could not relitigate claims for compensatory and punitive damages, based on the claim that the father-in-law had broken the verbal promise to give the widower a portion of life insurance proceeds to help defray the deceased wife's burial costs, as the matter had been previously resolved by summary judgment in favor of the father-in-law, which decision was affirmed on appeal; such a decision was binding, pursuant to O.C.G.A. § 9-11-60(h), in the subsequent trial with respect to whether a promise had been made and broken as to the disposition of the life insurance proceeds and the wid-

ower was barred from raising the issues relating to those damages by the doctrines of collateral estoppel and *res judicata* under O.C.G.A. § 9-12-40. *Hardwick v. Williams*, 272 Ga. App. 680, 613 S.E.2d 215 (2005).

Trial court correctly ruled that the claims against the third-party defendants were barred by *res judicata* because there was identity of the first and second causes of action, identity of the parties or their privies, a prior adjudication by a court of competent jurisdiction, and the assignee's managing partner and primary stockholder testified at deposition that the damages sought in the second suit were the same damages sought in the first suit. *Bostick v. CMM Props.*, 327 Ga. App. 137, 755 S.E.2d 895 (2014).

**One who objects to setting a part of the statutory homestead** by a referee in bankruptcy is not, by reason of that fact, estopped by *res judicata* from enforcing the lien of a judgment in one's favor, based upon a note waiving the benefits of one's homestead exemption. *Rosenthal v. Langley*, 180 Ga. 253, 179 S.E. 383, appeal dismissed, 295 U.S. 720, 55 S. Ct. 916, 79 L. Ed. 1674 (1935).

**Suit for rent following another suit for rent not barred.** — When in first suit the landlord merely sought and won judgment for past due rent, the first suit did not act as *res judicata* of the landlord's second suit for rent becoming due after the first suit. *Lowenberg v. Ford & Assocs.*, 165 Ga. App. 753, 302 S.E.2d 433 (1983).

**Application for partition following decree of cotenancy.** — Prior verdict and decree of cotenancy did not estop the defendant from applying for a partition, no such question being involved in the original suit. *Roberts v. Federal Land Bank*, 180 Ga. 832, 181 S.E. 180 (1935).

**Action based on cotenancy barred by cotenants' divorce decree.** — When matters of alimony and property interests between the parties are decided in a divorce, by consent or otherwise, O.C.G.A. § 9-12-40 operates to bar subsequent litigation between the parties as cotenants of a claim for rents which accrued prior to the divorce. *White v. Lee*, 250 Ga. 688, 300 S.E.2d 517 (1983).



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**Return of prisoner's property.** — When a prison inmate's motion for return of personal property in the inmate's criminal case had been denied and appealed directly, the ruling was res judicata, and the inmate was estopped from seeking return of that property in any other court action involving the same defendants. *Hooper v. Harris*, 236 Ga. App. 651, 512 S.E.2d 312 (1999).

**Order confirming or refusing to confirm a judicial sale,** if unexcepted to, is a final and conclusive judgment to the same extent as any other adjudication by a court of competent jurisdiction. *Hurt Bldg., Inc. v. Atlanta Trust Co.*, 181 Ga. 274, 182 S.E. 187 (1935).

**Effect of judgment cancelling fraudulent deed.** — Judgment in an equitable action for cancellation of a deed alleged to have been obtained by fraud did not bar a later action to establish a lost security deed and note and to foreclose the deed and note. *Eaton v. Weatherby*, 239 Ga. 795, 239 S.E.2d 8 (1977).

**Cause of action on account held not barred.** — When a judgment in a prior action determined only that the plaintiff's petition set out no cause of action for equitable accounting, but did not consider whether the defendant had a valid cause of action on account against the plaintiff, the doctrine of res judicata is inapplicable to the filing of such cross action by the defendant. *Eubanks v. Electrical Wholesalers, Inc.*, 116 Ga. App. 56, 156 S.E.2d 502 (1967).

**Defamation action was precluded** by res judicata because the plaintiff could have raised the claims in a prior action in which the plaintiff obtained a judgment against the defendant for breach of agreements concerning the plaintiff's purchase of the defendant's medical practice and for tortious interference with the plaintiff's practice. *Doman v. Banderas*, 231 Ga. App. 229, 499 S.E.2d 98 (1998).

**Tax suits.** — Res judicata was not applicable to suits involving real property tax assessments brought in separate years. *Henry County Bd. of Tax Assessors v. Bunn*, 217 Ga. App. 350, 457 S.E.2d 256 (1995).

**Judgment of a court of another jurisdiction** in the same cause of action between the same parties is res judicata of all questions that could have been heard and determined in the case in which the judgment was rendered. *Gillis v. Atlantic C.L.R.R.*, 52 Ga. App. 806, 184 S.E. 791 (1936).

Under the full faith and credit clause of the United States Constitution, a judgment of a court of competent jurisdiction in Tennessee, if properly proved, may have the effect of former adjudication in matters pending in the courts of this state. *Roadway Express, Inc. v. McBroom*, 61 Ga. App. 233, 6 S.E.2d 460 (1939).

**Action for continuing nuisance not barred by prior nuisance action.** — Homeowner's nuisance action against a county based on the county's failure to maintain a deteriorating retaining wall was not barred by res judicata based on the owner's prior nuisance action for diminution in value arising out of a failure to maintain a storm water drainage system because the present suit was for a continuing nuisance. *DeKalb County v. Heath*, 331 Ga. App. 179, 770 S.E.2d 269 (2015).

**Res judicata applied.** — Trial court correctly determined that res judicata barred an action against the defendant; the present action and the Tennessee action both sought damages against the defendant for alleged breach of contract for sale of the plaintiff's carpet business, both actions named the defendant as a party defendant, and the defendant made an appearance in the Tennessee action to contest jurisdiction. *Chrison v. H & H Interiors, Inc.*, 232 Ga. App. 45, 500 S.E.2d 41 (1998).

Pursuant to O.C.G.A. § 9-12-40, the trial court correctly dismissed the shareholders' second corporate derivative action against the corporation and two of the corporation's officers on the basis of res judicata because the second action was the same as the first, the parties were the same, except that the corporation, which had been a real party in interest in the first case, had been added as a party-defendant, the first case was decided by a court of competent jurisdiction, and the first case was decided on the



merits adversely to the shareholders since the shareholders failed to exhaust the corporation's internal corporate remedies. *Grable v. Warren Hawkins Post of the Am. Legion*, 264 Ga. App. 843, 592 S.E.2d 502 (2003).

Former employee's federal claims against a former employer were barred by the doctrine of res judicata, even though the state court in the employee's prior action did not hold a hearing before dismissing the employee's complaint under O.C.G.A. § 9-11-37(d)(1) because the employee completely ignored the employer's discovery requests, failed to respond to the employer's properly served motion for sanctions, and failed to request a hearing on the motion; thus, the state court was not required to hold a hearing before imposing the sanction of dismissal. *Moten v. Alberici Constructors, Inc.*, 380 F. Supp. 2d 1355 (N.D. Ga. 2005).

Because an agent's complaint against a city arose out of their roles in a sludge disposal program and because the agent forewent an opportunity to file a permissive cross-claim in the property owners' original litigation against the city and the agent, pursuant to O.C.G.A. § 9-12-40, res judicata barred the agent from bringing the claims in a subsequent action. *Sani-Agri Servs. v. City of Albany*, 278 Ga. App. 432, 629 S.E.2d 15 (2006).

Appeals court agreed with the trial court that the doctrine of res judicata barred the negligence and breach of contract claims asserted by two property owners against a contractor as: (1) the claims were essentially identical to the allegations in a counterclaim filed in a prior Cherokee County action; (2) the parties in the two cases were identical for purposes of res judicata; and (3) the Cherokee County suit resulted in an adjudication on the merits. *Perrett v. Sumner*, 286 Ga. App. 379, 649 S.E.2d 545 (2007).

In a 42 U.S.C. § 1983 case arising from a traffic accident in which the driver had filed an earlier state case that was decided on the merits, the driver's federal claims were barred by res judicata under O.C.G.A. § 9-12-40 even though the driver had added a police chief and deleted a police department from the federal case. The driver's claims against the po-

lice chief were predicated on the same operative facts relating to the traffic accident, and the driver could not avoid the application of res judicata by adding new parties. *Endsley v. City of Macon*, No. 08-13279, 2008 U.S. App. LEXIS 24003 (11th Cir. Nov. 20, 2008) (Unpublished).

Renter's suit asserting that the renter's due process rights were violated in connection with the renter's eviction after a bank's foreclosure on the property the renter was leasing was barred under the doctrine of res judicata pursuant to 28 U.S.C. § 1738 and O.C.G.A. § 9-12-40 because the renter had already filed numerous suits against the bank and the other defendants, the claims in the instant suit arose out of the same nucleus of operative fact as the claims asserted in the earlier suits, the suits involved the same parties, and the decisions of the state and federal courts that ruled in those actions constituted final judgments on the merits. *Vereen v. Everett*, No. 1:08-CV-1969-RWS, 2009 U.S. Dist. LEXIS 27302 (N.D. Ga. Mar. 31, 2009).

Plaintiffs' claims against a limited liability company (LLC) and the company's owners were res judicata and were barred by O.C.G.A. § 9-12-40 because the claims involved the same subject matter as the claims the plaintiffs raised in the plaintiffs' second civil action against the LLC and the owners, the temporary termination of their water supply; thus, the LLC was entitled to summary judgment. *Adams v. Tricord, LLC*, 299 Ga. App. 310, 682 S.E.2d 588 (2009).

Issues of fact remained as to whether title had not vested in transferees of real property from the debtor until within the reach-back period of 11 U.S.C. §§ 547 and 548, and a prior state court ruling did not have preclusive effect pursuant to O.C.G.A. § 9-12-40 or former O.C.G.A. § 24-4-42 (see now O.C.G.A. § 24-14-42). *Boudreaux v. Holloway* (In re Holloway), No. 10-03015, 2012 Bankr. LEXIS 1582 (Bankr. S.D. Ga. Mar. 30, 2012).

Trial court correctly granted family members' motion for summary judgment on the issue of res judicata as to any claim for an accounting prior to the date of a superior court judgment because the question of an accounting was previously liti-



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gated. *Evans v. Dunkley*, 316 Ga. App. 204, 728 S.E.2d 832 (2012).

Superior court erred in granting a mother's motion to dismiss a former partner's petition to adopt the mother's child because a judgment denying the mother's motion to set aside the adoption decree was res judicata as to the validity of the adoption decree and the superior court that dismissed the partner's petition for custody was not entitled to revisit the validity of the decree; although a superior court ultimately denied the mother's motion to set aside as untimely, the application of the time bar set out in O.C.G.A. § 19-8-18(e) presupposed that the adoption was one authorized by and entered in accordance with § 19-8-18(b). *Bates v. Bates*, 317 Ga. App. 339, 730 S.E.2d 482 (2012).

Trial court properly granted a homeowner's association summary judgment and dismissed a development company's third-party complaint asserting indemnity because in the main litigation the indemnity agreement was invalidated under O.C.G.A. § 13-8-2(b); thus, the third-party complaint was barred by res judicata. *Kennedy Dev. Co. v. Newton's Crest Homeowners' Ass'n*, 322 Ga. App. 39, 743 S.E.2d 600 (2013).

**Motion for new trial on evidentiary grounds.** — Grant or denial of an ordinary motion for new trial upon evidentiary grounds may, like other decisions, form the basis of res judicata. *Sumner v. Sumner*, 186 Ga. 390, 197 S.E. 833 (1938).

**Doctrine of res adjudicata applies to claim cases** as well as to other cases if the claim case in which such previous judgment was rendered involved the same cause of action as the pending litigation. *Cox v. Hargrove*, 205 Ga. 12, 52 S.E.2d 312 (1949).

**Application to fraudulent concealment case.** — Res judicata was inapplicable to a fraudulent concealment case brought by lawyers against clients as the case was completely different from an earlier case brought by the lawyers against the clients in which the lawyers sued one of the clients for failing to pay

attorney fees pursuant to a contract; in the current case, the lawyers sued the clients for fraudulently concealing assets so that the lawyers were unable to collect the judgment obtained in the first case, while in the current case, the lawyers were not making a claim for unpaid attorney's fees, which was the subject of the lawyer's first suit, but instead, were making a claim for fraud regarding the alleged asset concealment, and the clients were not able to establish the first prerequisite for application of the doctrine of res judicata, which was identity of cause of action. *Gerschick & Assocs., P.C. v. Pounds*, 266 Ga. App. 852, 598 S.E.2d 522 (2004).

**Application to criminal cases.** — Res judicata did not apply to require dismissal of a criminal action because the same issues had allegedly been raised in a prior civil case. *Carter v. State*, 231 Ga. App. 42, 497 S.E.2d 812 (1998).

Defendant's second motion to vacate a void judgment was properly denied as the motion was barred by the doctrine of res judicata and O.C.G.A. § 9-12-40 since the defendant could have challenged the sufficiency of the indictment against the defendant on the defendant's direct appeal, and since the defendant's arguments mirrored the arguments that the defendant had raised previously. *Rehberger v. State*, 267 Ga. App. 778, 600 S.E.2d 635 (2004).

When a defendant filed a pro se petition for habeas corpus while the defendant's request to file an out-of-time motion for a new trial was pending, the defendant's decision to go forward with the habeas action precluded the defendant under O.C.G.A. § 9-12-40 from later relitigating an ineffective assistance claim at the hearing on the motion for a new trial. *Spiller v. State*, 282 Ga. 351, 647 S.E.2d 64 (2007), cert. denied, 552 U.S. 1079, 128 S. Ct. 812, 169 L. Ed. 2d 612 (2007).

**Application to probate proceedings.** — Trial court erred by granting summary judgment to an estate executor in a suit asserting fraud and other claims brought by two siblings as the trial court incorrectly determined that the privileges set forth in O.C.G.A. §§ 51-5-7(2) and 51-5-8 applied to the fraud claims and neither collateral estoppel nor res judicata



barred the action since a prior probate court proceeding did not involve the same issues. Further, the probate court would have had no jurisdiction over the fraud and intentional interference with a gift claims. *Morrison v. Morrison*, 284 Ga. 112, 663 S.E.2d 714 (2008).

Court of appeals did not err in holding that *res judicata* barred a daughter's complaint for breach of contract against a widow because the relevant facts pled in the daughter's prior attempt to set aside the year's support granted to the widow on the basis of fraud were identical to those the daughter alleged in support of the breach of contract claim; the daughter's fraud claim was determined on the merits on appeal to the superior court, and the daughter had a full and fair opportunity to have litigated any related claims against the widow in the action the daughter initially filed in the probate court. *Crowe v. Elder*, 290 Ga. 686, 723 S.E.2d 428 (2012).

**Misconception of available remedy in former action.** — Doctrine of *res adjudicata* is not available as a bar to a subsequent action if the judgment in the former action was rendered because of a misconception of the remedy available or of the proper form of proceedings, and unless the former judgment was based upon the merits. *Densmore v. Brown*, 83 Ga. App. 366, 64 S.E.2d 78 (1951).

**Two simultaneously pursued causes of action.** — If one is pursuing at the same time in different courts the same cause of action against the same defendant, an adjudication on the merits of one would conclude further action on the other. *Jones v. Rich's, Inc.*, 81 Ga. App. 841, 60 S.E.2d 402 (1950).

**Effect on principal of judgment for agent.** — When the liability, if any, of the master to a third person is purely derivative and dependent entirely upon the principle of *respondeat superior*, a judgment on the merits in favor of the agent or servant is *res judicata* in favor of the principal or master though not a party to the action. This rule is an exemplification of the broader rule by which one whose liability is wholly derivative may claim the benefit of a judgment in favor of the person from whom the liability is derived,

if not based on grounds applicable only to the latter. *Roadway Express, Inc. v. McBroom*, 61 Ga. App. 223, 6 S.E.2d 460 (1939); *Gilmer v. Porterfield*, 233 Ga. 671, 212 S.E.2d 842 (1975).

Though a judgment in favor of a servant against a third party is *res judicata* in favor of the master, this is not to say that the master is bound by the servant's judgment in order to use it as *res judicata*, for the master can still sue the third person for damages to the master's vehicle or other property damaged in a collision, certainly if the former adjudication favored the servant and even when it went against the servant. Due process of law requires that the master, not having been a party to the prior adjudication, have the master's day in court. *Gilmer v. Porterfield*, 233 Ga. 671, 212 S.E.2d 842 (1975).

**Servant not in privity with master.** — Although a master has privity with a servant and can claim the benefit of an adjudication in favor of the servant, a servant is not in privity with the master so as to be able to claim the benefit of an adjudication in favor of the master. *Gilmer v. Porterfield*, 233 Ga. 671, 212 S.E.2d 842 (1975).

**Effect of bankruptcy judgment on company's successors in interest.** — Determination in bankruptcy judgment that corporation had not committed a fraud did not flow with the assets of the company to the company's successors in interest, president, majority shareholder, and a new company, especially when fraud in that transfer on the part of such successors, who were not parties to the first suit, was alleged, and they could assert prior judgment as a bar to suit. *Anderson Oil Co. v. Benton Oil Co.*, 246 Ga. 304, 271 S.E.2d 207 (1980).

**Authority of court at interlocutory hearing.** — At an interlocutory hearing, the court has no authority to dispose of a plea of *res judicata* and if evidence was otherwise sufficient to warrant the exercise of the court's discretion in granting the interlocutory injunction, the plaintiffs were entitled to such relief, even though the court, after the introduction of evidence at the trial term on the plea of *res judicata*, might be authorized to direct a



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verdict in favor of such plea. *Perry v. Gormley*, 183 Ga. 757, 189 S.E. 850 (1937).

**When settlement or compromise between parties enforced by court.** — When there is an honest difference of opinion between parties, touching a disputed claim, and especially if the difference is of such a nature as to render it at all doubtful as to who is correct, any settlement or compromise of these differences will be enforced by the courts, and neither party will be allowed to defend by showing that the party was right in the party's original contention. *Mutual of Omaha Ins. Co. v. Morris*, 120 Ga. App. 525, 171 S.E.2d 378 (1969).

**Arbitration proceedings.** — Even though the plaintiff was not technically a party to a prior arbitration proceeding in which an award was made in connection with a home construction contract, because the plaintiff was a co-owner of the property and actively participated in the arbitration proceeding, the plaintiff, as well as the plaintiff's spouse, was barred by res judicata and collateral estoppel from proceeding upon a lawsuit based upon the same facts. *Bennett v. Cotton*, 244 Ga. App. 784, 536 S.E.2d 802 (2000).

Court of Appeals erroneously held that the arbitrator, and not the court, should have decided whether arbitration was barred by res judicata as: (1) no presumption existed that an arbitrator was in a better position than a court to apply a legal doctrine such as res judicata; (2) the parties did not expressly reserve the issue for arbitration; and (3) there was no presumption under Georgia law that the application of a procedural bar such as res judicata was a matter to be determined exclusively by an arbitrator. *Bryan County v. Yates Paving & Grading Co.*, 281 Ga. 361, 638 S.E.2d 302 (2006).

Claims arising out of a county's termination of a construction contract that the contractor sought to have arbitrated were barred by the res judicata effect of a previous arbitration; by agreeing to defer a claim for lost income and then moving to confirm the arbitration award, the contractor waived the lost income claims. *Yates Paving & Grading Co. v. Bryan*

*County*, 287 Ga. App. 802, 652 S.E.2d 851 (2007).

**Settlement with one insurer not res judicata as to other.** — Denial of plaintiff's workers' compensation claim by Board of Workers' Compensation based on no liability stipulation and settlement entered into by the plaintiff and the plaintiff's employer's workers' compensation insurance carrier did not constitute res judicata as to whether the plaintiff's injury was compensable under the "Workers' Compensation Act" in plaintiff's action to recover on the plaintiff's medical insurance policy which denied coverage for injuries compensable under the "Workers' Compensation Act". *Cantrell v. Home Sec. Life Ins. Co.*, 165 Ga. App. 670, 302 S.E.2d 415 (1983).

**Effect of not defensively pleading res judicata.** — When the defendant, in answer to the plaintiff's petition, fails to file a plea of res judicata at the appropriate time, but relies upon res judicata as a ground for a motion to set aside a judgment, it should be overruled, since such matters are purely defensive and do not afford grounds to vacate or set aside the judgment. *Walthour v. Mock*, 102 Ga. App. 811, 117 S.E.2d 885 (1960).

County residents' challenge to a school board candidate's residency qualification under O.C.G.A. § 45-2-1(1) and Ga. Const. 1983, Art. VIII, Sec. V, Para. II, was barred by res judicata because another challenger had raised the same challenge, and the challenge had been resolved against the challenger by the county's board of elections. *Lilly v. Heard*, 295 Ga. 399, 761 S.E.2d 46 (2014).

**Summary judgment properly granted when res judicata defense pleaded.** — When a protestant in a processioning proceeding pleads the defense of res judicata and moves for summary judgment on this ground, supporting the motion with the record of a prior processioning proceeding between the same parties concerning the same issue of boundary and in which the protestant obtained judgment in the protestant's favor, and the applicant made no contrary showing, a motion for summary judgment is properly granted. *Souther v. Kichline*, 124 Ga. App. 111, 183 S.E.2d 87 (1971).



Trial court erred by granting family members summary judgment based on *res judicata* to the extent the children's action sought an accounting with respect to management of property after the prior judgment because the children's prior suit for an accounting of funds received and expended while managing the property was different. *Evans v. Dunkley*, 316 Ga. App. 204, 728 S.E.2d 832 (2012).

**Res judicata did not apply to a denial of motion for summary judgment.** — When the plaintiffs filed the plaintiffs' negligence lawsuit in the superior court of one county and that court denied the defendants' motion for summary judgment, the circuit court in the county to which the lawsuit was transferred did not err in reconsidering the defendants' motion for summary judgment and granting the motion because nothing limits the number of times a party may make a motion for summary judgment and *res judicata* does not apply to a denial of a motion for summary judgment. *Hubbard v. DOT*, 256 Ga. App. 342, 568 S.E.2d 559 (2002).

**Default or summary prior judgments.** — Prior judgments have *res judicata* applicability, even if they had been outright default or summary judgments, and the application of the doctrine of *res judicata* in this manner does not deprive a litigant of the litigant's right to "a day in court." *Fierer v. Ashe*, 147 Ga. App. 446, 249 S.E.2d 270 (1978).

Doctrine of *res judicata* applies even if the earlier judgment is a default judgment or a summary adjudication. *Morgan v. Department of Offender Rehabilitation*, 166 Ga. App. 611, 305 S.E.2d 130 (1983); *Quarterman v. Memorial Medical Ctr.*, 176 Ga. App. 92, 335 S.E.2d 589 (1985).

**Successful motion to dismiss may have res judicata effect.** — If the demurrer (now motion to dismiss) that was sustained in a former suit went to the merits of the case, it may be relied on under a plea of *res judicata*. *Avery v. Southern Ry.*, 47 Ga. App. 722, 171 S.E. 456 (1933); *Sudderth v. Harris*, 51 Ga. App. 654, 181 S.E. 122 (1935); *Gamble v. Gamble*, 204 Ga. 82, 48 S.E.2d 540 (1948), later appeal, 207 Ga. 380, 61 S.E.2d 836 (1950); *Dixon v. Dixon*, 211 Ga. 122, 84

S.E.2d 37 (1954); *Vidalia Prod. Credit Ass'n v. Durrence*, 94 Ga. App. 368, 94 S.E.2d 609 (1956); *Smith v. Bank of Acworth*, 111 Ga. App. 112, 140 S.E.2d 888 (1965); *General Shoe Corp. v. Hood*, 121 Ga. App. 444, 174 S.E.2d 212 (1970).

**Judgment not res judicata.** — When a general demurrer (now motion to dismiss) that does not go to the merits of the cause of action is sustained, the judgment sustaining the demurrer and dismissing the action will not be *res adjudicata* in a subsequent suit between the same parties on the same cause of action. *Buie v. Waters*, 209 Ga. 608, 74 S.E.2d 883 (1953).

In a client's fraud claim against an attorney, neither appellate opinions that the client could pursue that claim without filing the expert affidavit required under O.C.G.A. § 9-11-9.1(b) (now (e)) in professional malpractice claims, nor the trial court's subsequent denial of the attorney's summary judgment motion, asserting a failure to show a false representation or detrimental reliance, established the law of the case precluding the trial court from subsequently granting the attorney's summary judgment motion based on the client's failure to prove damages. *Hopkinson v. Labovitz*, 263 Ga. App. 702, 589 S.E.2d 255 (2003).

Trial court did not err in ruling for a creditor in the creditor's action pursuant to O.C.G.A. § 44-14-231 to foreclose on personal property and to recover monies lent and unpaid because the doctrine of *res judicata* did not apply when the merits of the creditor's claims for foreclosure and monies lent had not been previously adjudicated by a court of competent jurisdiction; the issue before an administrative law judge (ALJ) in the Office of State Administrative Hearing was limited to whether the Georgia Department of Revenue acted properly in cancelling the creditor's certificate of title to a vehicle, and in denying the creditor's motion for reconsideration, the ALJ specifically stated that the issue of whether the creditor would be reflected on the certificate of title to the vehicle as lienholder was not before the court. *Allen v. Santana*, 303 Ga. App. 844, 695 S.E.2d 314 (2010).

**Pleadings insufficient to allow court to determine whether res**



**Res Judicata (Cont'd)**

**judicata required dismissal of pro se action.** — In an action in which a former inmate, in a pro se action under 42 U.S.C. § 1983 attached to the complaint a copy of a June 29, 2004, Ante Litem Notice provided by an attorney to the Commissioner, Georgia Department of Corrections, the Chairman, Sumter County Board of Commissioners, and the Department of Administrative Services for the Risk Management Department detailing the inmate's 2003 accident and medical care thereafter, and announced an intention to file a lawsuit if the case was not settled, the inmate was ordered to file a supplemental complaint because the court could not determine whether the earlier action was filed and whether this case should be dismissed as res judicata. *Bray v. Ingram*, No. 1:05-CV-98(WLS), 2005 U.S. Dist. LEXIS 25832 (M.D. Ga. Oct. 27, 2005).

**Trial court erred in applying the doctrine of res judicata** in an action by a city seeking an injunction to require a company to remove billboards which were erected in violation of city ordinances because, even though a valid antecedent judgment existed which arose out of a case involving the same parties and in which the same matters either were in issue or could have been put in issue, the doctrine could not be applied to prevent the city from enforcing the city's ordinances. *City of Statham v. Diversified Dev. Co.*, 250 Ga. App. 846, 550 S.E.2d 410 (2001).

**Effect of a voluntary dismissal without prejudice.** — Defendant who voluntarily dismissed without prejudice a compulsory counterclaim could not renew the counterclaim as an original action under O.C.G.A. § 9-2-61 after the plaintiff had voluntarily dismissed with prejudice the main claim without objection by the defendant because renewal of the counterclaim was barred by res judicata. *Robinson v. Stokes*, 229 Ga. App. 25, 493 S.E.2d 5 (1997).

**Effect of a voluntary dismissal with prejudice.** — Voluntary dismissal with prejudice, although without order or approval of the trial court, is considered a judgment on the merits for purposes of res judicata. *Fowler v. Vineyard*, 261 Ga. 454,

405 S.E.2d 678 (1991), rev'g *Vineyard v. Fowler*, 197 Ga. App. 453, 398 S.E.2d 709 (1990).

**Judgment on demurrer (now motion to dismiss),** until reversed, concludes the parties on all questions necessarily or actually involved in the decision, but is not conclusive of any other issue. *Byrd v. Goodman*, 195 Ga. 621, 25 S.E.2d 34 (1943).

**Ruling action barred by res judicata on motion to dismiss proper.**

— When the court, on demurrer (now motion to dismiss), holds that the transaction upon which a recovery is sought does not, as it is alleged in the petition, constitute a cause of action, and dismisses the action on this ground, the judgment operates as a res adjudicata, and bars a subsequent suit between the parties on the same transaction, though in the first case the facts were untruly or improperly stated, and if the facts had been truly and properly stated, a cause of action would have been disclosed. *Woods v. Travelers Ins. Co.*, 53 Ga. App. 429, 186 S.E. 467 (1936); *Redwine v. Frizzell*, 186 Ga. 296, 197 S.E. 805 (1938); *Hughes v. Henderson*, 61 Ga. App. 743, 7 S.E.2d 317 (1940); *Owens v. Williams*, 87 Ga. App. 238, 73 S.E.2d 512 (1952).

**Dismissal as adjudication on merits.** — As to those matters to which a dismissal constitutes an adjudication on the merits, the defense of res judicata will lie and summary judgment may be had thereon. *Liner v. North*, 194 Ga. App. 175, 390 S.E.2d 263 (1990); *Head v. Head*, 199 Ga. App. 104, 403 S.E.2d 835 (1991).

**Res judicata does affect an attack on a garnishment order** issuing from the original judgment. *Georgia Farm Bldgs., Inc. v. Willard*, 169 Ga. App. 394, 313 S.E.2d 112, aff'd, 253 Ga. 649, 325 S.E.2d 591 (1984).

**Application in garnishment proceeding.** — Trial court properly granted a bank summary judgment in a suit for conversion against the bank brought by a debtor because the debtor's claim was barred by res judicata since the debtor failed to raise any challenge in the garnishment proceeding wherein the bank was a garnishee. *Copeland v. Wells Fargo Bank, N.A.*, 317 Ga. App. 669, 732 S.E.2d



536 (2012), cert. denied, No. S13C0189, 2013 Ga. LEXIS 124 (Ga. 2013).

**Attorney's action for reinstatement barred by res judicata.** — Federal district court judgment for the state bar, concluding that an attorney's action for reinstatement was barred by res judicata resulting from prior litigation in a state court, was res judicata in a subsequent state court action for reinstatement. *State Bar v. Beazley*, 256 Ga. 561, 350 S.E.2d 422 (1986), cert. denied, 481 U.S. 1016, 107 S. Ct. 1894, 95 L. Ed. 2d 501 (1987).

**Litigating existence of additional terms of same lease in subsequent action was impermissible** since the parties had the opportunity and the obligation in the first action to ensure that all terms of the lease were included in the court's judgment. *Lay Bros. v. Tahamtan*, 236 Ga. App. 435, 511 S.E.2d 262 (1999).

**Compulsory counterclaims.** — Since an insured's counterclaim for property damage against a tortfeasor, which the insured later withdrew, was a compulsory counterclaim, under O.C.G.A. § 9-11-13(a), the insurer was barred by res judicata and O.C.G.A. § 9-12-40 from reasserting that claim in a subsequent suit in which the insurer sought to recover from the tortfeasor for damages it paid to the insured. *Allstate Ins. Co. v. Welch*, 259 Ga. App. 71, 576 S.E.2d 57 (2003).

**Counterclaim in federal action which was not raised in earlier state action.** — In a federal declaratory judgment action to construe a tenant's repair, replacement, and maintenance obligations under a lease, the landlord's counterclaim for damages for breach of the duty to repair was barred by res judicata as the claim could have been raised in an earlier state action by the landlord alleging breach of contract by the tenant for, inter alia, the tenant's violation of the maintenance and repair provisions of the lease. *Capitol Funds, Inc. v. Arlen Realty, Inc.*, 755 F.2d 1544 (11th Cir. 1985).

**Judgment on counterclaim after dismissal of complaint.** — Although a dismissal without prejudice will not, standing alone, carry any res judicata effect, the entry of a judgment on a counterclaim asserted in that action does have res judicata effect. *Moate v. Moate*, 265

Ga. 418, 456 S.E.2d 502 (1995).

**Failure to file permissive cross-claim.** — Res judicata bars party who foregoes opportunity to file permissive cross-claim from bringing the claim in a subsequent action. *Fowler v. Vineyard*, 261 Ga. 454, 405 S.E.2d 678 (1991).

**Claims arising out of same traffic accident.** — Cross-claims for indemnification and contribution, and a later personal injury claim, both arising out of the same traffic accident, involve an identity of subject matter for purposes of res judicata. *Fowler v. Vineyard*, 261 Ga. 454, 405 S.E.2d 678 (1991).

**Declaratory judgment erroneously given res judicata effect.** — Federal district court erroneously interpreted Georgia law when the court gave res judicata effect to a declaratory judgment of the state superior court, which was not final because various counterclaims and cross claims were still pending. *Cable Holdings of Battlefield, Inc. v. Cooke*, 764 F.2d 1466 (11th Cir. 1985).

**When the second action merely involved new or different pleadings,** a former federal action barred a second state action, although in denying leave to amend because of prejudicial delay and dismissing the first action, the federal judge stated, "this action would not be considered a 'prior action based on the same set of facts' for purposes of applying the doctrine of res judicata in a subsequent suit." *Walker v. Kroger Co.*, 181 Ga. App. 745, 353 S.E.2d 551 (1987).

**RICO actions.** — When each of the victims of a fraudulent scheme sued the perpetrator for fraud and related claims, the victims could have also sued the perpetrator under the Georgia Racketeer Influenced and Corrupt Organizations Act (RICO), O.C.G.A. § 16-14-1 et seq., in the same action, and the victims should have raised such a claim in those actions because, when the victims did not and lost the victims' suits against the perpetrator, the victims were barred by collateral estoppel and res judicata from filing RICO claims against the perpetrator at a later time. *Austin v. Cohen*, 268 Ga. App. 650, 602 S.E.2d 146 (2004).

**Prior action in magistrate court** for wrongful garnishment barred a later



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wrongful garnishment claim asserted in state court under the doctrine of res judicata. *Brinson v. First Am. Bank*, 200 Ga. App. 552, 409 S.E.2d 50 (1991).

**Order rendered by responding court in Uniform Reciprocal Enforcement of Support Act, O.C.G.A. Art. 2, Ch. 11, T. 19, proceeding** is not res judicata in a subsequent action for arrearage under the original support order, subject to a setoff of any such arrearages already paid to prevent a double recovery. *State ex rel. Brookins v. Brookins*, 257 Ga. 205, 357 S.E.2d 77 (1987).

**Action for pain and suffering distinct from wrongful death case.** — When a wife's prior cause of action for the wrongful death of her husband was a separate and distinct cause of action from a subsequent action for pain and suffering she brought in her capacity as administratrix of her husband's estate, a judgment against her in the prior action did not bar the subsequent claim for pain and suffering on grounds of res judicata or collateral estoppel. *Stiltjes v. Ridco Exterminating Co.*, 197 Ga. App. 852, 399 S.E.2d 708 (1990), *aff'd*, 261 Ga. 697, 409 S.E.2d 847 (1991).

**Award of prejudgment interest.** — When a trial court, upon remittitur, entered a judgment as directed by the Court of Appeals, the trial court erred in then finding that the losing party's argument as to prejudgment interest was barred by res judicata since the award to the plaintiff of prejudgment interest under O.C.G.A. § 51-12-14 was not clearly erroneous until the Court of Appeals had reversed the earlier judgment. *City of Fairburn v. Cook*, 195 Ga. App. 265, 393 S.E.2d 70 (1990).

**Attorney's fees.** — Since the claim could have been raised in a suit on a note and security deed, a claim for contractual attorney's fees was barred by the doctrine of res judicata under O.C.G.A. § 9-12-40. *Kauka Farms, Inc. v. Scott*, 256 Ga. 642, 352 S.E.2d 373 (1987).

**Res judicata applied.** — Res judicata applied to bar the executor's action against the decedent's brother seeking to cancel a prior deed and to impose a con-

structive trust upon the property since the three criteria of O.C.G.A. § 9-12-40 were properly met. *McIver v. Jones*, 209 Ga. App. 670, 434 S.E.2d 504 (1993).

Because the employer did not raise the issue of credit for disability plan payments and did not appeal from the award of benefits by an administrative law judge at a workers' compensation hearing, the award was res judicata on the issue of credit for disability plan payments. *Webb v. City of Atlanta*, 228 Ga. App. 278, 491 S.E.2d 492 (1997).

Res judicata barred the plaintiff's second petition to be appointed executor of plaintiff's parent's estate. *In re Estate of Bagley*, 239 Ga. App. 877, 522 S.E.2d 281 (1999).

Res judicata precluded the patient from bringing a second action for medical malpractice, breach of contract, and failure to secure informed consent against the appellants since the first action was against the same defendant, there was an adjudication on the merits, and the patient had a full and fair opportunity to litigate the first action. *Simon v. Gunby*, 260 Ga. App. 3, 578 S.E.2d 482 (2003).

**Not applicable to motion to modify child support.** — Res judicata did not preclude the trial court from considering the wife's petition to modify child support as an action for modification is not identical to an original divorce action and the settlement agreement, which addressed child support, did not preclude modification of a child support award. *Odom v. Odom*, 291 Ga. 811, 733 S.E.2d 741 (2012).

**Borrowers' fraud and conversion claims not barred by res judicata.** — Bank assigned a note and a deed to secure debt to the borrowers' friend, who assigned them to a third party, which foreclosed on the borrowers' home and filed a successful dispossessory action against them. The borrowers' fraud and conversion claims against the bank were not barred by res judicata under OCGA § 9-12-40 or collateral estoppel as the bank was not a privy to the party involved in the dispossessory action. *Dennis v. First Nat'l Bank of the S.*, 293 Ga. App. 890, 668 S.E.2d 479 (2008).

**Issue barred by res judicata.** — Whether the city could be held liable for



failure to maintain the drainage system was decided in the city's favor in the initial suit; therefore, in a subsequent suit, a claim for a declaratory judgment against the city regarding the city's responsibility for maintaining the system was barred by the doctrine of res judicata. *Macko v. City of Lawrenceville*, 231 Ga. App. 671, 499 S.E.2d 707 (1998), overruled on other grounds, *Kleber v. City of Atlanta*, 291 Ga. App. 146, 661 S.E.2d 195 (2008).

Res judicata doctrine did not bar the corporation's counterclaim that the corporation had easement rights in the parking deck of a building the corporation purchased from the law school as the prior litigation it was involved in with the law school over who was the building's rightful owner and whether the law school was required to give the corporation a limited warranty deed after the law school reacquired the property did not involve the same issue in the subsequent litigation between the limited liability company, whose sole member was the law school, and the corporation; indeed, the issue of easement rights did not come up until after that prior litigation ended. *Parking Deck LLC v. Anvil Corp.*, 259 Ga. App. 1, 576 S.E.2d 24 (2002).

Trial court properly dismissed an injured person's premises liability complaint against a store owner on the basis of res judicata since the injured person's earlier action against the store owner on the identical claim was dismissed because it failed to state a claim upon which relief could be granted; as this was a decision on the merits, the doctrine of res judicata barred a subsequent lawsuit on this claim. *Brown v. J. H. Harvey Co.*, 268 Ga. App. 322, 601 S.E.2d 808 (2004).

**Finality of judgment.** — It is the general rule that a judgment sought to be used as a basis for the application of the doctrine of res judicata must be a final judgment. *Reid v. Reid*, 201 Ga. App. 530, 411 S.E.2d 754 (1991).

**No final judgment if appeal pending.** — Judgment is not final, for purposes of res judicata, while an appeal is pending. *Thomas v. Brown*, 708 F. Supp. 336 (N.D. Ga. 1989).

Because a dispossessory court never

ruled upon or resolved a landlord's claims for past due rent and other damages, and because the dispossessory court lacked jurisdiction over the defaulting tenants, who were served by "nail and mail" service under O.C.G.A. § 44-7-51(a), the landlord's claims were not barred by the doctrine of res judicata under O.C.G.A. § 9-12-40 or subject to a plea of abatement under O.C.G.A. §§ 9-2-5(a) and 9-2-44(a). *Bhindi Bros. v. Patel*, 275 Ga. App. 143, 619 S.E.2d 814 (2005).

**Failure to appeal a prior judgment rendered judgment binding.** — Homeowners' complaint against a homeowners' association was properly dismissed for failure to state a claim because the complaint challenged a prior judgment obtained by the association against the homeowners from which the homeowners did not appeal. That prior judgment was therefore res judicata. *Laosebikan v. Lakemont Cmty. Ass'n*, 302 Ga. App. 220, 690 S.E.2d 505 (2010).

**Issuance of a writ of possession constituted "final judgment"** of the magistrate court since the only relief requested by the plaintiff was the issuance of the writ and the plaintiff expressly declined to seek judgment for any amounts due under the lease between the parties. *Atlanta J's, Inc. v. Houston Foods, Inc.*, 237 Ga. App. 415, 514 S.E.2d 216 (1999).

**Medical malpractice.** — Res judicata required the subject matter of the causes of action at issue to be identical; the dismissal of a patient's malpractice suit against a doctor based on the first of three surgeries relating to the patient's breast implants did not bar a second suit based on the two later surgeries, although all three surgeries were related to one another. *Gunby v. Simon*, 277 Ga. 698, 594 S.E.2d 342 (2004).

### Estoppel by Judgment

**Meaning of term.** — Estoppel by judgment occurs when the issue determined in the prior proceeding is the same as that in the subsequent proceeding. *Firestone Tire & Rubber Co. v. Pinyan*, 155 Ga. App. 343, 270 S.E.2d 883 (1980).

Doctrine of estoppel by judgment has reference to previous litigation between



**Estoppel by Judgment (Cont'd)**

the same parties based upon a different cause of action. *Usher v. Johnson*, 157 Ga. App. 420, 278 S.E.2d 70 (1981).

**Plea of estoppel by judgment stems from the doctrine of res judicata** and is available when there has been a former adjudication of the same issues by the parties or their privies, even though the adjudication may not have been upon the same cause of action. *House v. Benton*, 42 Ga. App. 97, 155 S.E. 47 (1930); *Thompson v. Thompson*, 199 Ga. 692, 35 S.E.2d 262 (1945); *Powell v. Powell*, 200 Ga. 379, 37 S.E.2d 191 (1946); *Blakely v. Couch*, 129 Ga. App. 625, 200 S.E.2d 493 (1973); *Price v. Winn*, 142 Ga. App. 790, 237 S.E.2d 409 (1977).

**Applicable rule.** — Different rule from that in this section applies in regard to estoppel by judgment. *Scarborough v. Edgar*, 176 Ga. 574, 168 S.E. 592 (1933), overruled on other grounds, *Jones v. Dean*, 188 Ga. 319, 3 S.E.2d 894 (1939).

**Collateral estoppel prevented issues decided in federal action from being relitigated** in the state court action against the defendants. *Brewer v. Schacht*, 235 Ga. App. 313, 509 S.E.2d 378 (1998).

Because the Eleventh Circuit Court of Appeals expressly ruled that a sheriff's deputy had probable cause for the traffic stop and arrest of a driver based upon a tag light violation, had probable cause for arrest based upon the driver's acts of obstruction, and had not used excessive force in making the arrest, under the doctrine of collateral estoppel, the Court of Appeals of Georgia was compelled to hold that the issues as to the lawfulness of the deputy's actions, probable cause, and excessive force could not be relitigated; thus, the deputy was properly granted summary judgment as to these claims in the state court. *Draper v. Reynolds*, 278 Ga. App. 401, 629 S.E.2d 476 (2006).

**Previous action may be unrelated.** — Estoppel by judgment can arise by virtue of a judgment authorized by the pleadings, rendered in previous litigation between the same parties, based upon an altogether different cause of action. *Capps v. Toccoa Falls Light & Power Co.*, 46 Ga.

App. 268, 167 S.E. 530 (1933).

**Identity of parties.** — To create estoppel by judgment the parties must be the same or in privy. *Forrester v. Southern Ry.*, 268 F. Supp. 194 (N.D. Ga. 1967); *National Hills Shopping Ctr., Inc. v. Insurance Co. of N. Am.*, 308 F. Supp. 248 (S.D. Ga. 1970).

**Estoppel must be mutual.** — There is one general rule, which is applicable alike to estoppel by record, by deed, and to equitable estoppel or estoppel in pais: that is, that estoppels must be mutual. Strangers can neither take advantage of, nor be bound by an estoppel; its binding effect is between the immediate parties, their privies in blood, in law, and by estate. *Porterfield v. Gilmer*, 132 Ga. App. 463, 208 S.E.2d 295 (1974), *aff'd*, 233 Ga. 671, 212 S.E.2d 842 (1975).

**Matters must be within scope of previous pleadings.** — There is an estoppel by judgment only as to such matters within the scope of the previous pleadings as necessarily had to be adjudicated in order for the previous judgment to be rendered, or as to such matters within the scope of the pleadings as might or might not have been adjudicated, but which are shown by outside proof to have been actually litigated and determined. *Powell v. Powell*, 200 Ga. 379, 37 S.E.2d 191 (1946); *Usher v. Johnson*, 157 Ga. App. 420, 278 S.E.2d 70 (1981).

**Issue barred by collateral estoppel.** — Any claims for damages allegedly occurring after the first suit were barred by collateral estoppel to the extent that such claims were premised upon the homeowner's assertions that the city was responsible for maintaining the subdivision's drainage system since the first suit found that the city did not exert control over the drainage system. *Macko v. City of Lawrenceville*, 231 Ga. App. 671, 499 S.E.2d 707 (1998), overruled on other grounds, *Kleber v. City of Atlanta*, 291 Ga. App. 146, 661 S.E.2d 195 (2008).

In finding that a debtor had committed waste, mismanaged the funds of the debtor's ward, and failed to account for those funds, a probate court actually litigated the issue of defalcation for purposes of 11 U.S.C. § 523(a)(4) and the court's order was given collateral estoppel effect in the



dischargeability proceeding. *Clark v. Sanders* (In re Sanders), 315 B.R. 630 (Bankr. S.D. Ga. 2004).

Denial of a sister's and an executrix's motions for a judgment notwithstanding the verdict were reversed as a constructive trust could not be imposed over the proceeds of a condemnation since: (1) a mother did not make any agreement with her children regarding the quitclaim deeds or the proceeds of the condemnation; (2) the documents signed by the siblings were unequivocal and unrestricted; (3) the mother did not make any promise with the intent not to carry it out; (4) there was nothing to indicate that when the mother obtained a certificate of deposit and opened a money market account in her and the executrix's and the sister's names as joint tenants with right of survivorship, she meant to do anything other than that; and (5) the siblings did not raise the issue of a constructive trust in the condemnation proceedings and were collaterally estopped from raising the issue in a later action. *Jenkins v. Jenkins*, 281 Ga. App. 756, 637 S.E.2d 56 (2006), cert. denied, 2007 Ga. LEXIS 87 (Ga. 2007).

Collateral estoppel applied to bar the debtor from relitigating the issue of a default judgment for the debtor's liability for fraud, wrongful eviction, and punitive damages pursuant to 11 U.S.C. § 523(a)(2) and (6), as well as pursuant to O.C.G.A. § 9-12-40; thus, judgment in the amount of \$222,833 was granted. *Hebbard v. Camacho* (In re Camacho), 411 B.R. 496 (Bankr. S.D. Ga. 2009).

**Separate action for contribution not barred.** — Party who chooses not to assert his or her claim for contribution as a counterclaim is not barred from bringing a separate suit for contribution after a judgment has been entered in the original tort action. *Tenneco Oil Co. v. Templin*, 201 Ga. App. 30, 410 S.E.2d 154 (1991).

**Question must have been one of the "ultimate" questions or facts** in issue as opposed to a supporting evidentiary or "mediate" question. *Forrester v. Southern Ry.*, 268 F. Supp. 194 (N.D. Ga. 1967).

**Collateral matter only incidentally considered by court.** — If a question comes collaterally before a court and is

only incidentally considered, the judgment or decree is no estoppel. *Mortgage Bond & Trust Co. v. Colonial Hill Co.*, 175 Ga. 150, 165 S.E. 25 (1932).

**Burden on party relying on claim.**

— When a judgment is claimed as an estoppel, the burden is upon the party relying thereon to show that the particular matter in controversy was necessarily or actually determined in the party's favor in the former litigation; and if it appears from the record introduced in support of such claim that several issues were involved in the previous litigation, and the verdict and judgment therein do not clearly show that the particular issue was then decided, before such claim can be sustained the uncertainty must be removed by extrinsic evidence showing that the issue was then decided in favor of the party relying upon such adjudication or estoppel. *Gormley v. Cleveland*, 187 Ga. 457, 200 S.E. 793 (1939); *Gunnin v. Carlile*, 195 Ga. 861, 25 S.E.2d 652 (1943).

Upon the party setting up an estoppel by judgment rests the burden of proving it, and it matters not how numerous the questions involved in the suit may be, provided they were tried and decided for the judgment is conclusive not only of the thing directly decided, but of every fact which was essential to the adjudication; any conclusion which the court or jury must evidently have arrived at in order to reach the judgment or verdict rendered will be fully concluded. *Usher v. Johnson*, 157 Ga. App. 420, 278 S.E.2d 70 (1981).

**Action to recover wrongfully taken property different from divorce action.** — Since a divorce action did not as originally filed pray for alimony or for the recovery of other property, it follows that as first brought that action was based on a different cause of action from the one in the subsequent action, which sought among other things to recover property wrongfully taken from the spouse before the action for divorce was filed. *Thompson v. Thompson*, 199 Ga. 692, 35 S.E.2d 262 (1945).

**Questioning validity of earlier judgment.** — When a party, in temporary alimony proceedings, contends that he is not subject to a judgment therefor because he had made a final alimony settlement



**Estoppel by Judgment (Cont'd)**

with his wife by contract, under the doctrine of estoppel by judgment, he is concluded in a subsequent contempt proceeding from contending that the judgment awarding temporary alimony was void because he was never his wife's lawful husband. *Powell v. Powell*, 200 Ga. 379, 37 S.E.2d 191 (1946).

**Administrative decision may act as an estoppel** in a judicial proceeding involving the same parties only if the issue decided by the administrative body is the same as that involved in the litigation. *Epps Air Serv., Inc. v. Lampkin*, 229 Ga. 792, 194 S.E.2d 437 (1972).

**Effect of finding that action barred by statute of limitations or laches.** — Finding against a party, either upon final hearing or demurrer (now motion to dismiss), that the party's cause of action as shown by the party is barred by the statute of limitations or by laches is a decision upon the merits, concluding the right of action. *Gamble v. Gamble*, 204 Ga. 82, 48 S.E.2d 540 (1948), later appeal, 207 Ga. 380, 61 S.E.2d 836 (1950); *Capps v. Toccoa Falls Light & Power Co.*, 46 Ga. App. 268, 167 S.E. 530 (1933); *College Park Land Co. v. Mayor of College Park*, 48 Ga. App. 528, 173 S.E. 239 (1934); *Slaughter v. Slaughter*, 190 Ga. 229, 9 S.E.2d 70 (1940); *Thompson v. Thompson*, 199 Ga. 692, 35 S.E.2d 262 (1945); *Powell v. Powell*, 200 Ga. 379, 37 S.E.2d 191 (1946); *Firestone Tire & Rubber Co. v. Pinyan*, 155 Ga. App. 343, 270 S.E.2d 883 (1980).

**Raising of paternity issue.** — Child was not collaterally estopped from asserting that she was the daughter of the deceased in an action for her share of an intestate estate despite the fact that a divorce decree between her mother and a third party provided for her support and visitation; the mother's interests at the time of the divorce were not in privity with those of her child and the child was not

estopped from raising the issue of her paternity. *Pinkard v. Morris*, 215 Ga. App. 297, 450 S.E.2d 330 (1994).

**Custody issue could not be relitigated.** — Estoppel by judgment prevented a parent from relitigating a custody issue which was decided by the juvenile court in a prior contempt action brought by the parent against the other parent. *Williams v. Stepler*, 227 Ga. App. 591, 490 S.E.2d 167 (1997).

**Child support recovery based on fraud.** — Action by a parent for recovery of child support, the gravamen of which was that the obligated parent misrepresented income to the Department of Human Resources in an earlier proceeding, was barred on the basis that the consent judgment entered in the earlier proceeding was res judicata and binding until reversed or set aside, and that it was too late to set it aside because a motion to set aside a judgment for fraud must be brought within three years from entry of the judgment. *Turner v. Butler*, 245 Ga. App. 250, 537 S.E.2d 703 (2000).

**Preclusive effect of default judgment in bankruptcy.** — Since under Georgia law a default judgment is a decision on the merits for purposes of estoppel by judgment, the default judgment has preclusive effect in determining whether the judgment debt fell within the fraud exception to dischargeability in bankruptcy. *League v. Graham*, 191 Bankr. 489 (Bankr. N.D. Ga. 1996).

Trial court did not err in granting a lender's motion for summary judgment because the doctrine of res judicata barred a debtor's suit alleging that the lender incorrectly charged interest on the debtor's unsecured revolving line of credit; the same matters were already litigated between the same parties in an action previously adjudicated on the merits by a court of competent jurisdiction. *Rose v. Household Fin. Corp.*, 316 Ga. App. 282, 728 S.E.2d 879 (2012).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 46 Am. Jur. 2d, Judgments, § 444 et seq.

**Am. Jur. Pleading and Practice Forms.** — 15 Am. Jur. Pleading and Practice Forms, Judgments, §§ 55, 273.

**C.J.S.** — 50 C.J.S., Judgments, § 926 et seq.

**ALR.** — Judgment against less than all parties to contract as bar to action against others, 1 ALR 1601.

Judgment in favor of less than all parties to contract as bar to action against other parties, 2 ALR 124.

Application of doctrine of res judicata to item of single cause of action omitted from issues through ignorance, mistake, or fraud, 2 ALR 534; 142 ALR 905.

Judgment against executor or administrator qualified in one state as binding upon an executor or administrator of the same decedent, qualified in another, 3 ALR 64.

Judgment against claim based on original form of indebtedness as res judicata as to claim based on new or substituted obligation, 4 ALR 1173.

Rule against collateral attack as applicable to temporary injunction, 12 ALR 1165.

Judgment on claim as bar to action to recover amount of payment which was not litigated in previous action, 13 ALR 1151.

Right of infant to set aside consent judgment in action for personal injuries, 15 ALR 667; 20 ALR 1249.

Judgment in an action for death as a bar to another action for the same death in another jurisdiction or under another statute, 26 ALR 984; 53 ALR 1275.

Judgment in action on commercial paper as affecting party to the paper who was not a party to the suit, 34 ALR 152.

Effect, in subsequent proceedings, of paternity findings or implications in divorce or annulment decree or in support or custody order made incidental thereto, 39 ALR 1215; 78 ALR3d 846.

Judgment for rent for particular period as bar to action for rent for subsequent period, 42 ALR 128.

Conclusiveness of decree assessing stockholders of insolvent corporation as against nonresident stockholders not per-

sonally served within the state in which it was rendered, 48 ALR 669; 175 ALR 1419.

Judgment in action for services of physician or surgeon as bar to action against him for malpractice, 49 ALR 551.

Suit in one state or country to enforce a contract as regards real property therein as a bar to suit in another state or country to enforce the contract as regards the property therein, 52 ALR 180.

Judgment in action between assignee and third person as res judicata in action arising out of same transaction as assigned claim between assignor and third person, 55 ALR 1037.

Conclusiveness of officer's return of service of process on which judgment in sister state was rendered, 59 ALR 1398.

Judgment in favor of defendant in action by personal representative for damage to estate by injury resulting in death as bar to action in behalf of statutory beneficiaries, 64 ALR 446.

Judgment in favor of defendant or respondent in an action or proceeding involving a matter of public right or interest as a bar to a subsequent action or proceeding by a different plaintiff or relator, 64 ALR 1262.

Rendition of judgment against one not a formal party, who has assumed the defense, 65 ALR 1134.

Judgment in replevin as bar to action by plaintiff for consequential damages for wrongful seizure or conversion of property, 69 ALR 655.

Error in excluding recovery for future or permanent damages as affecting the operation of judgment as bar or res judicata in subsequent action to recover future damages, 69 ALR 1004.

Judgment in action on accident or health policy as res judicata or estoppel in subsequent action involving same accident or sickness, 70 ALR 1457.

Judgment in action or proceeding involving an installment of an assessment for a public improvement as res judicata as regards other installments of assessments, 74 ALR 880.

Right of assignee of judgment against joint tort-feasors as between whom there is no right of contribution, 75 ALR 1468.



Necessity of verdict against servant or agent as condition of verdict against master or principal for tort of servant or agent, 78 ALR 365.

Successful defense by one codefendant, or a finding for "defendants," as inuring to benefit of defaulting defendant, 78 ALR 938.

Conclusiveness of judgment against foreign corporation as to jurisdictional fact of doing business within state where that fact was contested, 80 ALR 719.

Reversal of judgment as affecting another judgment based on the reversed judgment and rendered pending the appeal, 81 ALR 712.

Judgment in action in which matter was asserted as a defense without seeking affirmative relief as precluding use of such matter as basis of an independent action, offset, or counterclaim, 83 ALR 642.

Divorce decree as res judicata in respect of community property, 85 ALR 339.

Distinction between judgment as bar to cause of action and as estoppel as to particular fact, 88 ALR 574.

Denial of motion to dissolve temporary restraining order, temporary or preliminary injunction, or injunction pendente lite as res judicata so as to negative action on bond, 92 ALR 273.

Change of former decisions by court of last resort as ground of relief from decrees or orders rendered or entered in the interval in other cases, 95 ALR 708.

Judgment as res judicata of usury notwithstanding question as to usury was not raised, 98 ALR 1027.

Judgment in favor of defendant in action for personal injuries as bar to suit for death caused by such injuries, and vice versa, 99 ALR 1091.

Judgment for plaintiff in action in tort or contract against codefendants, as conclusive in subsequent action between codefendants as to the liability of both or the liability of one and nonliability of the other, 101 ALR 104; 142 ALR 727.

Homestead exemption as exception to rule that judgment is conclusive as to defenses which might have been but were not raised, 103 ALR 934.

Judgment in action for personal injuries as res judicata or estoppel as to negligence and contributory negligence in action for

damages to property in same accident and vice versa, 104 ALR 973.

Judgment or order upholding prior judgment in the same state against direct attack upon ground of lack of jurisdiction, as conclusive in another state under the full faith and credit provision or doctrine of res judicata, 104 ALR 1187.

Judgment in action for personal injuries to or death of one person as res judicata or conclusive of matters there litigated in subsequent action for personal injury to or death of another person in the same accident, 104 ALR 1476.

Findings or order upon application for alimony pendente lite in action for divorce or separation as res judicata, 105 ALR 1406.

Conclusiveness of judgment on demurrer, 106 ALR 437.

Judgment in action for conversion or to recover possession of personal property, resulting from defalcation or misappropriation, as res judicata of subsequent action for conversion or to recover possession, 106 ALR 1425.

When finding or adjudication as to one's mental condition by official or body not clearly judicial is conclusive evidence or has effect of a judgment as regards legal mental status, 108 ALR 47.

Decree in suit by judgment creditor to set aside conveyance in fraud of creditors as bar to another suit for same purpose in respect of another conveyance, 108 ALR 699.

Advantage which the original trier of facts enjoyed over reviewing court from opportunity of seeing and hearing witnesses, 111 ALR 742.

Judgment for plaintiff in negligence action as available to one who was not a party to that action but who is made defendant in a subsequent action as derivatively responsible, 112 ALR 404.

Tort damaging real property as creating a single cause of action or multiple causes of action in respect of different portions of land of the same owner affected thereby, 117 ALR 1216.

Adjudication in fixing inheritance, succession, or estate tax, as conclusive for other purposes, 117 ALR 1227.

Judgment or order in connection with appointment of executor or administrator



as res judicata, as law of the case, or as evidence, on questions other than the validity of the appointment, 119 ALR 594.

Judgment in action for personal injury or death as res judicata as to negligence or contributory negligence in subsequent action for death in same accident of person whose estate was represented by defendant in first action, 119 ALR 1469.

Pleading waiver, estoppel, and res judicata, 120 ALR 8.

Judgment against tort-feasor's insurer in action by injured person as res judicata in similar action by another person injured in same accident, 121 ALR 890.

Res judicata as regards decisions or awards under workmen's compensation acts, 122 ALR 550.

Judgment in action by third person against insured as res judicata in favor of indemnity or liability insurer which was not a nominal party, 123 ALR 708.

Power, in absence of reservation by statute or decree, to modify provision in decree of divorce or separation as to alimony or separate maintenance, 127 ALR 741.

Judgment in action between property owner and public improvement district or its officer as res judicata as against certificate holders who were not parties, 128 ALR 392.

Doctrine of res judicata as applied to judgments by default, 128 ALR 472; 77 ALR2d 1410.

Judgment in action by or against corporation as res judicata in action by or against stockholder or officer of corporation, 129 ALR 1041.

Doctrine of res judicata in income tax cases, 130 ALR 374; 140 ALR 797.

Decree of court of domicil respecting validity or construction of will, or admitting it or denying its admission to probate, as conclusive as regards real estate in another state devised by will, 131 ALR 1023.

Judgment in action growing out of accident as res judicata, as to negligence or contributory negligence, in later action growing out of same accident by or against one not a party to earlier action, 133 ALR 181; 23 ALR2d 710.

Necessity, as condition of effectiveness of express finding on a matter in issue to prevent relitigation of question in later

case, that judgment in former action shall have rested thereon, 133 ALR 840.

Ruling on creditor's claim in bankruptcy as res judicata in subsequent proceeding by trustee to recover voidable preference or transfer, 134 ALR 1191; 165 ALR 1413.

Allowance or rejection of claim in bankruptcy proceedings as res judicata in independent action or proceeding between the claimant and another creditor, 135 ALR 695.

Rule of res judicata as applied to judicial construction of will, 136 ALR 1180.

Judgment as res judicata or conclusive as to party's attorney who was not himself a party, 137 ALR 586.

Decree in suit for separation as res judicata in subsequent suit for divorce or annulment, 138 ALR 346; 90 ALR2d 745.

Judgment as conclusive as against, or in favor of one not a party of record or privy to a party, who prosecuted or defended suit on behalf and in the name of party, or assisted him or participated with him in its prosecution or defense, 139 ALR 9.

Judgment as res judicata as to whether insured is "permanently disabled" within contemplation of insurance policy, 142 ALR 1170.

Res judicata as affected by limitation of jurisdiction of court which rendered judgment, 147 ALR 196; 83 ALR2d 977.

Finality, for purposes of appeal, of judgment in federal court which disposes of plaintiff's claim, but not of defendant's counterclaim, or vice versa, 147 ALR 583.

Conclusiveness as to merits of judgment of court of foreign country, 148 ALR 991.

Judgment in wrongful death action as res judicata in a subsequent action in same jurisdiction for the same death under same statute brought by or for benefit of statutory beneficiary whose status as such was ignored in the former action, 148 ALR 1346.

Res judicata as affected by newly discovered evidence after judgment, 149 ALR 1195.

Judgment in tax cases in respect of one period as res judicata in respect of another period, 150 ALR 5; 162 ALR 1204.

Domestic decree of divorce based upon a finding of invalidity of a previous divorce in another state, as estopping party to the



domestic suit to assert, in a subsequent litigation, the validity of the divorce decree in the other state, 150 ALR 465.

Validity and effect of former judgment or decree as proper subject for consideration in declaratory action, 154 ALR 740.

Judgment in action for damages to real property situated in another state or county as conclusive in respect of title, 158 ALR 362.

Judgment based on construction of instrument as res judicata of its validity, 164 ALR 873.

Reversal upon appeal by, or grant of new trial to, one coparty defendant against whom judgment was rendered, as affecting judgment in favor of other coparty defendants, 166 ALR 563.

Validity and effect of judgment based upon erroneous view as to constitutionality or validity of a statute or ordinance going to the merits, 167 ALR 517.

Judgment for or against person in fiduciary capacity as res judicata for or against him in his individual or a different fiduciary capacity, or vice versa, 170 ALR 1180.

Conclusiveness of allowance of account of trustee or personal representative as respects self-dealing in assets of estate, 1 ALR2d 1060.

Denial of divorce in sister state or foreign country as res judicata in another suit for divorce between the same parties, 4 ALR2d 107.

Privity as between lessor or bailor and lessee or bailee of personal property as regards effect of judgment in third person's action for damages against lessee or bailee as res judicata in lessor's or bailor's subsequent action against third person for damage to the property, or vice versa, 4 ALR2d 1378.

Judgment as res judicata pending appeal or motion for a new trial, or during the time allowed therefor, 9 ALR2d 984.

Judgment in suit for cancellation of restrictive covenant on ground of change in neighborhood as res judicata in suit for injunction against enforcement of covenant on that ground, and vice versa, 10 ALR2d 357.

Extent to which principles of res judicata are applicable to judgments in actions for declaratory relief, 10 ALR2d 782.

Judgment for or against partner as res judicata in favor of or against copartner not a party to the judgment, 11 ALR2d 847.

Judgment avoiding indemnity or liability policy for fraud as barring recovery from insurer by or on behalf of third person, 18 ALR2d 891.

Judgment denying validity of will because of undue influence, lack of mental capacity, or the like, as res judicata as to validity of another will, deed, or other instrument, 25 ALR2d 657.

Decree granting or refusing injunction as res judicata in action for damages in relation to matter concerning which injunction was asked in first suit, 26 ALR2d 446.

Divorce decree as res judicata in independent action involving property settlement agreement, 32 ALR2d 1145.

Judgment in bastardy proceeding as conclusive of issues in subsequent bastardy proceeding, 37 ALR2d 836.

Acquittal on homicide charge as bar to subsequent prosecution for assault and battery, or vice versa, 37 ALR2d 1068.

Effect of verdict "for plaintiff" in action against multiple defendants, 47 ALR2d 803.

Applicability of res judicata to decrees or judgments in adoption proceedings, 52 ALR2d 406.

Dismissal of civil action for want of prosecution as res judicata, 54 ALR2d 473.

Judgment involving real property against one spouse as binding against other spouse not a party to the proceeding, 58 ALR2d 701.

Conviction from which appeal is pending as bar to another prosecution for same offense, 61 ALR2d 1224.

Judgment determining question of coverage of automobile liability policy as between insurer and one claiming to be insured as res judicata in subsequent action by injured person against insurer, 69 ALR2d 858.

Doctrine of res judicata as applied to default judgments, 77 ALR2d 1410.

Judgment in action by or against stockholder or corporate officer as res judicata in action by or against corporation, 81 ALR2d 1323.



Res judicata as affected by limitation of jurisdiction of court which rendered judgment, 83 ALR2d 977.

Judgment in false imprisonment action as res judicata in later malicious prosecution action, or vice versa, 86 ALR2d 1385.

Erroneous decision as law of the case on subsequent appellate review, 87 ALR2d 271.

Decree in suit for "separation" as res judicata in subsequent suit for divorce or annulment, 90 ALR2d 745.

Circumstances under which court may abate a prior action and permit parties to proceed in subsequent action, 6 ALR3d 468.

Modern status of doctrine of res judicata in criminal cases, 9 ALR3d 203.

Judgment in spouse's action for personal injuries as binding, as regards loss of consortium and similar resulting damage, upon other spouse not a party to the action, 12 ALR3d 933.

Judgment in action against codefendants for injury or death of person, or for damage to property, as res judicata in subsequent action between codefendants as to their liability inter se, 24 ALR3d 318.

Liability insurer's right to open or set aside, or contest matters relating to merits of, judgment against insured, entered in action in which insurer did not appear or defend, 27 ALR3d 350.

Mutuality of estoppel as prerequisite of availability of doctrine of collateral estoppel to a stranger to the judgment, 31 ALR3d 1044.

Judgment in action against seller or supplier of product as res judicata in action against manufacturer for injury from

defective product, or vice versa, 34 ALR3d 518.

Judgment in action on express contract for labor or services as precluding, as a matter of res judicata, subsequent action on implied contract (quantum meruit) or vice versa, 35 ALR3d 874.

Decree allowing or denying specific performance of contract as precluding, as a matter of res judicata, subsequent action for money damages for breach, 38 ALR3d 323.

Judgment against parents in action for loss of minor's services as precluding minor's action for personal injuries, 41 ALR3d 536.

When does jeopardy attach in a nonjury trial?, 49 ALR3d 1039.

Acquittal in criminal proceeding as precluding revocation of probation on same charge, 76 ALR3d 564.

Acquittal as bar to prosecution of accused for perjury committed at trial, 89 ALR3d 1098.

Modern views of state courts as to whether consent judgment is entitled to res judicata or collateral estoppel effect, 91 ALR3d 1170.

Judgment in death action as precluding subsequent personal injury action by potential beneficiary of death action, or vice versa, 94 ALR3d 676.

Right to probate subsequently discovered will as affected by completed prior proceedings in intestate administration, 2 ALR4th 1315.

Doctrine of res judicata or collateral estoppel as barring relitigation in state criminal proceedings of issues previously decided in administrative proceedings, 30 ALR4th 856.

## 9-12-41. Effect of judgment in rem.

A judgment in rem is conclusive upon everyone. (Orig. Code 1863, § 3750; Code 1868, § 3774; Code 1873, § 3827; Code 1882, § 3827; Civil Code 1895, § 5372; Civil Code 1910, § 5967; Code 1933, § 110-502.)

### JUDICIAL DECISIONS

**Persons bound by judgments in rem.** — Judgment strictly in rem binds only those who could have made them-

selves parties to the proceedings, and those who had notice either actual or constructively by the thing condemned



being first seized into the custody of the court. *Elliott v. Adams*, 173 Ga. 312, 160 S.E. 336 (1931).

**When admitting in rem proceeding as evidence improper.** — When the plaintiff not having been a party to the in rem proceeding and having no notice thereof, actual or constructive, is not bound by the judgment rendered therein, the trial judge erred in admitting the in rem proceedings and the judgment rendered therein as evidence over the objection of the plaintiff that they were irrelevant and immaterial. *Elliott v. Adams*, 173 Ga. 312, 160 S.E. 336 (1931).

**Proceeding under the Land-Registration Act**, Ga. L. 1917, p. 108, § 1 (see now O.C.G.A. Art. 2, Ch. 2, T. 44) is, by express words, a proceeding in rem. *Rock Run Iron Co. v. Miller*, 156 Ga. 136, 118 S.E. 670 (1923).

**Suit for partition is not a proceeding in rem** nor is the final judgment binding on any of the cotenants who are not brought within the jurisdiction of the court by some service of process, either actual or constructive. *Childs v. Hayman*, 72 Ga. 791 (1884).

**Defense of excessive levy.** — When a judgment is in rem against a described piece of property, the defense of excessive levy does not lie. *Edwards v. Decatur Bank & Trust Co.*, 176 Ga. 194, 167 S.E. 292 (1932).

**Effect on property rights.** — Proceedings quasi in rem are brought to establish status, and not to set up rights in or title to property; and judgments in such proceedings are not conclusive against third persons as to their rights in, or title to, property when the third parties have no notice or opportunity to assert their rights. *Elliott v. Adams*, 173 Ga. 312, 160 S.E. 336 (1931).

**Cited in** *Carter v. Bush*, 216 Ga. 429, 116 S.E.2d 568 (1960); *Cureton v. Cureton*, 218 Ga. 88, 126 S.E.2d 666 (1962); *Carswell v. Cannon*, 110 Ga. App. 315, 138 S.E.2d 468 (1964); *Save The Bay Comm., Inc. v. Mayor of Savannah*, 227 Ga. 436, 181 S.E.2d 351 (1971); *Parris v. Slaton*, 131 Ga. App. 92, 205 S.E.2d 67 (1974); *State Bar v. Beazley*, 256 Ga. 561, 350 S.E.2d 422 (1986).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 47 Am. Jur. 2d, Judgments, § 463 et seq.

**Am. Jur. Pleading and Practice Forms.** — 15 Am. Jur. Pleading and Practice Forms, Judgments, § 93.

**C.J.S.** — 50 C.J.S., Judgments, §§ 1382, 1383, 1388.

**ALR.** — Reversal of judgment as affecting another judgment based on the reversed judgment and rendered pending the appeal, 81 ALR 712.

Judgment against tort-feasor's insurer in action by injured person as *res judicata* in similar action by another person injured in same accident, 121 ALR 890.

Decree of court of domicile respecting validity or construction of will, or admitting it or denying its admission to probate, as conclusive as regards real estate in another state devised by will, 131 ALR 1023.

Judgment involving real property against the spouse as binding against other spouse not a party to the proceeding, 58 ALR2d 701.

Jurisdiction on constructive or substituted service, in divorce or alimony action, to reach property within state, 10 ALR3d 212.

## 9-12-42. Judgment no bar absent decision on merits.

Where the merits were not and could not have been in question, a former recovery on purely technical grounds shall not be a bar to a subsequent action brought so as to avoid the objection fatal to the first. For a former judgment to be a bar to subsequent action, the merits of



the case must have been adjudicated. (Civil Code 1895, § 5095; Civil Code 1910, § 5679; Code 1933, § 110-503.)

**History of Code section.** — This Code section is derived from the decision in *National Bank v. Southern Porcelain Mfg. Co.*, 59 Ga. 157 (1877).

**Law reviews.** — For note discussing the requirement that an adjudication be on the merits for the principles of res

judicata to apply, see 11 Ga. L. Rev. 929 (1977).

For case comment, “Yost v. Torok and Abusive Litigation: A New Tort to Solve an Old Problem,” see 21 Ga. L. Rev. 429 (1986).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

DISMISSED ACTIONS

ESTOPPEL BY JUDGMENT

APPLICATION

- 1. IN GENERAL
- 2. DIVORCE
- 3. BANKRUPTCY

General Consideration

**Relation to § 9-12-40.** — The conflict between former Civil Code 1910, §§ 4335, 4336, 4337, 5678, 5679, and 5973 (see now O.C.G.A. §§ 9-2-44, 9-12-40, and 9-12-42) was reconciled by the fact that former Civil Code 1910, §§ 4335, 4337, 5678, and 5679 (see now O.C.G.A. §§ 9-2-44 and 9-12-42) have special application to estoppels by judgment, and former Civil Code 1910, §§ 4336 and 5943 (see now O.C.G.A. § 9-12-40) applied when a plea of res adjudicata is available. *Camp v. Lindsay*, 176 Ga. 438, 168 S.E. 284 (1933).

Former Code 1933, §§ 110-501 and 110-503 (see now O.C.G.A. §§ 9-12-40 and 9-12-42) provide the primary basis for the laws relating to conclusiveness of judgment. *Gilmer v. Porterfield*, 233 Ga. 671, 212 S.E.2d 842 (1975).

Read together and affirmatively, O.C.G.A. §§ 9-12-40 and 9-12-42 provide that a judgment on the merits of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue, or which under the rules of law might have been put in issue, in the cause wherein the judgment was rendered, until such judgment shall be reversed or set aside. *Transamerica Ins. Co. v. Thrift-Mart, Inc.*, 159 Ga. App. 874, 285 S.E.2d 566 (1981).

**Effect of stare decisis.** — Stare decisis, unlike res judicata or collateral estoppel, does not involve claim preclusion or issue preclusion; it does not work as a bar but only dictates the conclusion of law which will be made upon a given set of facts. *Norris v. Atlanta & W.P.R.R.*, 254 Ga. 684, 333 S.E.2d 835 (1985).

**Only judgment on merits conclusive.** — Under rules of res judicata and estoppel by judgment, in order for a former decision to be conclusive, it must have been based, not on purely technical grounds, but at least in part on the merits when under the pleadings they were or could have been involved. *Sumner v. Sumner*, 186 Ga. 390, 197 S.E. 833 (1938); *Hughes v. Cobb*, 195 Ga. 213, 23 S.E.2d 701 (1942); *Thompson v. Thompson*, 199 Ga. 692, 35 S.E.2d 262 (1945); *Powell v. Powell*, 200 Ga. 379, 37 S.E.2d 191 (1946); *King Sales Co. v. McKey*, 105 Ga. App. 787, 125 S.E.2d 684 (1962).

Under both the doctrine of estoppel by judgment and the doctrine of res judicata, in order for the former decision to be conclusive, it must have been based, not merely on purely technical grounds, but at least in part on the merits when under the pleadings they were or could have been involved. *Usher v. Johnson*, 157 Ga. App. 420, 278 S.E.2d 70 (1981).



**General Consideration (Cont'd)**

**Identity of cause of action.** — Tenant's claim against landlord for wrongful eviction and related claims were not barred by res judicata for tenant's failure to raise them in the dispossessory action filed by the landlord, because the claims were based on a different set of facts from those relevant to the dispossessory action, so that there was no identity of cause of action between the two cases. *Stringer v. Bugg*, 254 Ga. App. 745, 563 S.E.2d 447 (2002).

**Reason judgment on merits constitutes bar.** — Judgment upon the merits amounts to a declaration of the law as to rights and duties of parties, based upon the ultimate facts and upon which the right of recovery depended, and hence is a bar to an action for the same cause. *Wood v. Wood*, 86 Ga. App. 32, 70 S.E.2d 545 (1952).

**Former trial must have been of adversary nature.** — For the former judgment to be a bar, a bona fide adversary trial must have taken place. *Blakely v. Couch*, 129 Ga. App. 625, 200 S.E.2d 493 (1973).

**When a judgment is rendered in conformance with an agreement to settle,** there has not been an adjudication upon the merits, despite the wording of the judgment. *Blakely v. Couch*, 129 Ga. App. 625, 200 S.E.2d 493 (1973).

**Attachment against property of the debtor** is not a proceeding involving the merits of the controversy. *Hayes v. International Harvester Co. of Am.*, 52 Ga. App. 328, 183 S.E. 197 (1935).

**Judgment sustaining motion to dismiss.** — Judgment sustaining a general demurrer (now motion to dismiss) to a declaration in an action at law may be pled in bar to another suit for the same cause. *Dunton v. Mozley*, 42 Ga. App. 295, 155 S.E. 794 (1930).

Judgment sustaining a general demurrer (now motion to dismiss) for a petition seeking equitable relief does not necessarily adjudicate the merits of the case, even though facts constituting a valid legal cause of action may be set forth, since the scope of such judgment may be limited in a decision upon the question as to whether

the plaintiff was entitled to the particular relief sought. *Dunton v. Mozley*, 42 Ga. App. 295, 155 S.E. 794 (1930).

**Previous decision not rendered on the merits.** — While the judgment of a court upon demurrer (now motion to dismiss) which decides the merits of the cause may be pled in bar of another suit for the same cause, this principle has no application if the previous decision of the court on the demurrer did not pass upon the merits the cause, but reversed the trial court for overruling a demurrer. *Bowman v. Bowman*, 209 Ga. 200, 71 S.E.2d 84 (1952).

**Effect of not basing court's judgment on merits of the case.** — When a general demurrer (now motion to dismiss) that does not go to the merits of the cause of action is sustained, the judgment sustaining the demurrer and dismissing the action will not be res adjudicata in a subsequent action between the same parties on the same cause of action. *Buie v. Waters*, 209 Ga. 608, 74 S.E.2d 883 (1953); *Smith v. Southeastern Courts, Inc.*, 89 Ga. App. 789, 81 S.E.2d 226 (1954); *Dixon v. Dixon*, 211 Ga. 122, 84 S.E.2d 37 (1954); *Keith v. Darby*, 104 Ga. App. 624, 122 S.E.2d 463 (1961); *Smith v. Bank of Acworth*, 111 Ga. App. 112, 140 S.E.2d 888 (1965); *Horton v. Harvey*, 221 Ga. 799, 147 S.E.2d 505 (1966).

**Application of collateral estoppel by federal bankruptcy court.** — Although, under Georgia law, the collateral estoppel effect of a judgment entered against a debtor is not diminished by the fact that the judgment resulted from a default, the federal bankruptcy court, based on policy considerations, would not apply collateral estoppel to conclude from a state default judgment in a libel and slander case that the defendant's intent in making alleged defamatory statements was willful and malicious so as to render the resulting debt nondischargeable in bankruptcy. *Wright v. McIntyre*, 57 Bankr. 961 (Bankr. N.D. Ga. 1986).

Although collateral estoppel could be applied to a state court judgment to enable a federal bankruptcy court to reach conclusions about facts that would be considered as evidence of non-dischargeability, the present record was



not sufficient to permit an accurate and complete determination of the underlying grounds or basis for the state court's ruling as to the defendant's liability. *Sims v. Morris*, 185 Bankr. 939 (Bankr. N.D. Ga. 1994).

**Dismissal for insufficiency of pleading.** — Because the petition to quiet title was dismissed for failure to describe the land, the petitioner was barred by res judicata from instituting a subsequent action for declaratory and injunctive relief based on the same facts; res judicata applies not only when a case is decided on the case's merits, but also when the case could have been so decided, had the case been handled appropriately by the litigants in the original case. *Piedmont Cotton Mills, Inc., v. Woelper*, 269 Ga. 109, 498 S.E.2d 255 (1998).

**In order for the doctrine of res judicata to apply**, or for a party to take advantage of the doctrine in a subsequent suit brought against the party after the termination of the first, there are three prerequisites to which the situation must conform. They are: (1) identity of parties; (2) identity of the cause of action; and (3) adjudication by a court of competent jurisdiction. All of these elements must concur. *Firestone Tire & Rubber Co. v. Pinyan*, 155 Ga. App. 343, 270 S.E.2d 883 (1980).

**Use of res judicata to bar actions.** — When the merits of the plaintiff's case have been passed upon by a judgment sustaining general demurrer (now motion to dismiss), and dismissing the complaint, a subsequent action between the same parties, seeking the same relief upon substantially the same grounds, is barred under the doctrine of res judicata. *Smith v. Bird*, 189 Ga. 105, 5 S.E.2d 336 (1939).

**Ruling on motion to dismiss in equitable proceeding.** — If, the ruling on general demurrer (now motion to dismiss), in an equitable proceeding must necessarily have adjudicated the question as to whether or not a cause of action existed, the ruling on such a demurrer becomes res judicata as against a subsequent action at law for damages on the same cause. *Dunton v. Mozley*, 42 Ga. App. 295, 155 S.E. 794 (1930).

**Grant of habeas corpus by prior judgment.** — When a previous writ of

habeas corpus in an extradition proceeding was granted because of the insufficiency of the supporting documents or other technical defects which may be subsequently corrected, the prior judgment granting the writ of habeas corpus will not be res judicata in a subsequent extradition demand brought to avoid the technical objections fatal to the first proceeding. *Harris v. Massey*, 241 Ga. 580, 247 S.E.2d 55 (1978).

**Res adjudicata is not available as a bar to a subsequent action** if the judgment in the former action was rendered because of a misconception of the remedy available or of the proper form of proceedings. *Densmore v. Brown*, 83 Ga. App. 366, 64 S.E.2d 78 (1951).

**When a judgment in a prior suit is pending appeal**, res judicata cannot be sustained in bar of a present suit. *Montgomery v. DeKalb Steel, Inc.*, 144 Ga. App. 191, 240 S.E.2d 741 (1977).

**Effect of grant of summary judgment in prior action.** — When an order granting summary judgment in a prior action is relied upon in final support of a plea of res judicata in a subsequent action, if that summary judgment actually was an adjudication of the merits, a plea in bar, or otherwise on the merits, the plea of res judicata should be sustained; however, if examination shows that the summary judgment actually was not an adjudication of the merits, a dilatory plea, etc., the res judicata plea should be denied. *National Heritage Corp. v. Mount Olive Mem. Gardens, Inc.*, 244 Ga. 240, 260 S.E.2d 1 (1979).

**Effect of lack of privity.** — Although lack of mutuality does not preclude assertion of plea of collateral estoppel, lack of privity does. *Montgomery v. DeKalb Steel, Inc.*, 144 Ga. App. 191, 240 S.E.2d 741 (1977).

**Rules of practice and procedure are not technicalities**, but, on the contrary, are fundamentally important to the administration of justice by the courts. *Tyndale v. Manufacturers Supply Co.*, 209 Ga. 564, 74 S.E.2d 857 (1953).

**Cited in** *Loveless v. Carten*, 64 Ga. App. 54, 12 S.E.2d 175 (1940); *Hadden v. Fuqua*, 194 Ga. 621, 22 S.E.2d 377 (1942); *Crenshaw v. Crenshaw*, 198 Ga. 536, 32



**General Consideration (Cont'd)**

S.E.2d 177 (1944); *Wills v. Purcell*, 198 Ga. 666, 32 S.E.2d 392 (1944); *Parker v. Giles*, 71 Ga. App. 763, 32 S.E.2d 408 (1944); *Woodland Hills Co. v. Coleman*, 73 Ga. App. 409, 36 S.E.2d 826 (1946); *Conner v. Bowdoin*, 80 Ga. App. 807, 57 S.E.2d 344 (1950); *Wood v. Wood*, 86 Ga. App. 32, 70 S.E.2d 545 (1952); *Bowman v. Bowman*, 209 Ga. 200, 71 S.E.2d 84 (1952); *William v. Richards*, 100 Ga. App. 501, 111 S.E.2d 632 (1959); *Garland v. State*, 101 Ga. App. 395, 114 S.E.2d 176 (1960); *Banks v. Sirmans*, 218 Ga. 413, 128 S.E.2d 66 (1962); *Smith v. Davis*, 222 Ga. 839, 152 S.E.2d 870 (1967); *Swinney v. Reeves*, 224 Ga. 274, 161 S.E.2d 273 (1968); *Ezzard v. Morgan*, 118 Ga. App. 50, 162 S.E.2d 793 (1968); *Miami Properties, Inc. v. Fitts*, 226 Ga. 300, 175 S.E.2d 22 (1970); *Whitley Constr. Co. v. Whitley*, 134 Ga. App. 245, 213 S.E.2d 909 (1975); *Lester v. Trust Co.*, 144 Ga. App. 526, 241 S.E.2d 633 (1978); *Paul v. Bennett*, 241 Ga. 158, 244 S.E.2d 9 (1978); *Madison, Ltd. v. Price*, 146 Ga. App. 837, 247 S.E.2d 523 (1978); *Ellington v. Lowe*, 160 Ga. App. 879, 288 S.E.2d 594 (1982); *Norris v. Atlanta & W.P.R.R.*, 254 Ga. 684, 333 S.E.2d 835 (1985); *Wehunt v. Wren's Cross of Atlanta Condominium Ass'n*, 175 Ga. App. 70, 332 S.E.2d 368 (1985); *Citizens Exch. Bank v. Kirkland*, 256 Ga. 71, 344 S.E.2d 409 (1986); *State Bar v. Beazley*, 256 Ga. 561, 350 S.E.2d 422 (1986); *Jones v. Powell*, 190 Ga. App. 619, 379 S.E.2d 529 (1989); *United States Fid. & Guar. Co. v. State Farm Mut. Auto. Ins. Co.*, 195 Ga. App. 14, 392 S.E.2d 574 (1990); *Marcoux v. Fields*, 195 Ga. App. 573, 394 S.E.2d 361 (1990); *Arnold v. Brundidge Banking Co.*, 209 Ga. App. 278, 433 S.E.2d 388 (1993); *Akin v. PAFEC Ltd.*, 991 F.2d 1550 (11th Cir. 1993); *Pruett v. Commercial Bank*, 211 Ga. App. 692, 440 S.E.2d 85 (1994); *Woelper v. Piedmont Cotton Mills, Inc.*, 226 Ga. App. 337, 487 S.E.2d 5 (1997); *Chrison v. H & H Interiors, Inc.*, 232 Ga. App. 45, 500 S.E.2d 41 (1998).

**Dismissed Actions**

**Denial of a motion for summary judgment** is not a final decision. *American Living Sys. v. Bonapfel* (In re All Am.

of Ashburn, Inc.), 56 Bankr. 186 (Bankr. N.D. Ga.), aff'd, 805 F.2d 1515 (11th Cir. 1986).

**Order granting a motion for summary judgment** with respect to fewer than all of the parties has no preclusive effect. *American Living Sys. v. Bonapfel* (In re All Am. of Ashburn, Inc.), 56 Bankr. 186 (Bankr. N.D. Ga.), aff'd, 805 F.2d 1515 (11th Cir. 1986).

**Dismissal of premature action not adjudication on merits.** — When the judgment of dismissal in the first suit was based upon the ground that the due date of the note had not yet arrived, the judgment did not go to the merits of the action but was merely a dilatory plea, and consequently, that judgment was not an adjudication of the merits of the claim and will not sustain a plea of res judicata in a later action on the note. *Crockett v. Shafer*, 166 Ga. App. 453, 304 S.E.2d 405 (1983).

**Dismissal of former action for technical reasons.** — If the former action was dismissed for defects in the pleadings or for lack of necessary parties or as a result of the plaintiff's misconception of the form of the proceeding or for want of the jurisdiction of the court to try the claim or in fact was disposed of on any ground which did not go to the merits of the action the judgment rendered does not constitute a bar to another suit. *O'Kelley v. Alexander*, 225 Ga. 32, 165 S.E.2d 648 (1969).

**Dismissal based on willful failure to comply with an order** can have the effect of an adjudication on the merits. However, a dismissal which does not involve any finding of willfulness but which is merely an automatic action following a certain lapse of time falls within the "purely technical" rule of this section and cannot be considered an adjudication which would bar a subsequent action. *Maxey v. Covington*, 126 Ga. App. 197, 190 S.E.2d 448 (1972).

**Dismissal of a complaint for failure to answer interrogatories** operates as an adjudication on the merits under subsection (b) of Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-11-41) absent the trial court's specifying to the contrary. This was consistent with former Code 1933,



§ 110-503 (see now O.C.G.A. § 9-12-42), for there had been an adjudication on the merits by operation of subsection (b) of Ga. L. 1966, p. 609, § 41. *Old S. Inv. Co. v. Aetna Ins. Co.*, 124 Ga. App. 697, 185 S.E.2d 584 (1971).

**Dismissal of action for failure to make necessary parties.** — When plaintiff in error had the plaintiff's bill of exceptions dismissed by the Court of Appeals because the plaintiff had failed to make the necessary parties, the judgment rendered by the lower court became final. A reading of that judgment will disclose that it was based upon the merits of the case and not decided on a technicality. *Tyndale v. Manufacturers Supply Co.*, 209 Ga. 564, 74 S.E.2d 857 (1953).

**Dismissal for lack of prosecution.** — When a motion to dismiss an action for want of prosecution is sustained by the court and it appears from the record that the ground upon which this motion was sustained was not a ground which adjudicated the merits of the controversy, such judgment of dismissal will not be a bar to a subsequent proceeding for the same cause of action brought within the time allowed by law. *Floyd & Beasley Transf. Co. v. Copeland*, 107 Ga. App. 304, 130 S.E.2d 143 (1963).

Dismissal of a complaint for want of prosecution was not an adjudication on the merits; thus, collateral estoppel and res judicata did not bar a subsequent complaint. *Valdez v. R. Constr., Inc.*, 285 Ga. App. 373, 646 S.E.2d 329 (2007).

**When dismissal for failure to prosecute res judicata.** — When dismissal for failure to prosecute is involuntary under subsection (b) of O.C.G.A. § 9-11-41 the court does not specify that dismissal is without prejudice, the dismissed action is res judicata as to essentially the same action brought at a later time, and the trial court does not err in granting the defendant's motion to dismiss. *Krasner v. Verner Auto Supply, Inc.*, 130 Ga. App. 892, 204 S.E.2d 770 (1974).

### Estoppel by Judgment

**Res judicata and estoppel by judgment distinguished.** — While res judicata applies only as between the same parties and upon the same cause of action

to matters which were actually in issue or which under the rules of law could have been put in issue, estoppel by judgment applies as between the same parties upon any cause of action to matters which were directly decided in the former suit. While the phrase "same parties" does not mean that all of the parties on the respective sides of the litigation in the two cases shall have been identical, it does mean that those who invoke the defense and against whom the defense is invoked must be the same. *Firestone Tire & Rubber Co. v. Pinyan*, 155 Ga. App. 343, 270 S.E.2d 883 (1980).

**Doctrine of estoppel by judgment** has reference to previous litigation between the same parties based upon a different cause of action. *Thompson v. Thompson*, 199 Ga. 692, 35 S.E.2d 262 (1945); *Powell v. Powell*, 200 Ga. 379, 37 S.E.2d 191 (1946).

Estoppel by judgment occurs when the issue determined in the prior proceeding is the same as that in the subsequent proceeding. *Firestone Tire & Rubber Co. v. Pinyan*, 155 Ga. App. 343, 270 S.E.2d 883 (1980).

There is an estoppel by judgment only as to matters within the scope of the previous pleadings as necessarily had to be adjudicated in order for the previous judgment to be rendered, or as to such matters within the scope of the pleadings as might or might not have been adjudicated, but which are shown by outside proof to have been actually litigated and determined. *Thompson v. Thompson*, 199 Ga. 692, 35 S.E.2d 262 (1945); *Powell v. Powell*, 200 Ga. 379, 37 S.E.2d 191 (1946); *Firestone Tire & Rubber Co. v. Pinyan*, 155 Ga. App. 343, 270 S.E.2d 883 (1980).

**Under doctrine of estoppel by judgment validity of earlier judgment cannot be questioned.** — When a party, in temporary alimony proceedings, contends that he is not subject to a judgment therefor because he had made a final alimony settlement with his wife by contract, under the doctrine of estoppel by judgment, he is concluded in a subsequent contempt proceeding from contending that the judgment awarding temporary alimony was void because he was never his wife's lawful husband. *Powell v. Pow-*



**Estoppel by Judgment** (Cont'd)

ell, 200 Ga. 379, 37 S.E.2d 191 (1946).

**Application****1. In General**

**Plea of collateral estoppel is available in a wrongful death action.** *Montgomery v. DeKalb Steel, Inc.*, 144 Ga. App. 191, 240 S.E.2d 741 (1977).

**Unappealed deprivation orders of the juvenile court** may be used to establish that the children were deprived within the meaning of former O.C.G.A. § 15-11-94(b)(4)(A)(i) (see now O.C.G.A. § 15-11-310); since the parents did not appeal the deprivation decision regarding their children, they were bound by the determination that their children were deprived under O.C.G.A. §§ 9-12-40 and 9-12-42. *In the Interest of C.M.*, 258 Ga. App. 387, 574 S.E.2d 433 (2002).

**2. Divorce**

**Former alimony judgment based on different cause of action.** — Party is not estopped from questioning the validity of an earlier judgment granting temporary alimony under the doctrine of res judicata since the original judgment, rendered in previous litigation between the

same parties, was based upon a different cause of action from a subsequent proceeding for contempt. *Powell v. Powell*, 200 Ga. 379, 37 S.E.2d 191 (1946).

**Original alimony action different from subsequent property action.** — When a divorce action did not originally pray for alimony or for recovery of other property, that action was based on a different cause of action from the one in the subsequent action, which sought among other things to recover property wrongfully taken from the spouse before the suit for divorce was filed. *Thompson v. Thompson*, 199 Ga. 692, 35 S.E.2d 262 (1945).

**3. Bankruptcy**

**Ruling disallowing claim in bankruptcy for late filing.** — Judgment of a court of bankruptcy disallowing a claim on the ground that the claim was not filed within time is not an adjudication upon the merits of the claim, and when thereafter, the holder of such claim attempts to enforce the claim by levy upon property of the bankrupt, it is error to sustain an affidavit of illegality thereto on the ground that the judgment of the bankruptcy court was an adjudication that the judgment was not a valid lien against the property of the bankrupt. *Georgia Sec. Co. v. Arnold*, 56 Ga. App. 532, 193 S.E. 366 (1937).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 47 Am. Jur. 2d, Judgments, §§ 463, 540 et seq.

**C.J.S.** — 50 C.J.S., Judgments, § 979 et seq.

**ALR.** — Application of doctrine of res judicata to item of single cause of action omitted from issues through ignorance, mistake, or fraud, 2 ALR 534; 142 ALR 905.

Jurisdiction of action by mother or child for support of child born after divorce in another state or country, 32 ALR 659.

Action or suit as abating mandamus proceeding or vice versa, 37 ALR 1432.

Abatement by pendency of another action as affected by addition or omission of parties defendant in second suit, 44 ALR 806.

Judgment in action for services of phy-

sician or surgeon as bar to action against him for malpractice, 49 ALR 551.

Delegation to police officer of power to direct street traffic, 60 ALR 504.

Error in excluding recovery for future or permanent damages as affecting the operation of judgment as bar or res judicata in subsequent action to recover future damages, 69 ALR 1004.

Judgment in favor of defendant in action for personal injuries as bar to suit for death caused by such injuries, and vice versa, 99 ALR 1091.

Decree settling account of executor who is also trustee as res judicata in respect of his liability in capacity of trustee, 116 ALR 1290.

Necessity, as condition of effectiveness of express finding on a matter in issue to prevent relitigation of question in later



case, that judgment in former action shall have rested thereon, 133 ALR 840.

Judgment as conclusive as against, or in favor of one not a party of record or privy to a party, who prosecuted or defended suit on behalf and in the name of party, or assisted him or participated with him in its prosecution or defense, 139 ALR 9.

Application of rule against splitting cause of action, or of doctrine of res judicata, to item of single cause of action doctrine of res judicata, to item of single cause of action omitted from issues through ignorance, mistake, or fraud, 142 ALR 905.

Provision that judgment is "without prejudice" or "with prejudice" as affecting its operation as res judicata, 149 ALR 553.

Judgment in action for damages to real property situated in another state or county as conclusive in respect of title, 158 ALR 362.

Judgment for defendant based on the statute of limitations as bar to maintenance of action in another state, 164 ALR 693.

Decree granting or refusing injunction as res judicata in action for damages in relation to matter concerning which injunction was asked in first suit, 26 ALR2d 446.

Divorce decree as res judicata in independent action involving property settlement agreement, 32 ALR2d 1145.

Domestic divorce decree without adjudication as to alimony, rendered on personal service or equivalent, as precluding later alimony award, 43 ALR2d 1387.

Dismissal of civil action for want of prosecution as res judicata, 54 ALR2d 473.

Decree in suit for "separation" as res judicata in subsequent suit for divorce or annulment, 90 ALR2d 745.

Res judicata or collateral estoppel effect, in states where real property is located, of foreign decree dealing with such property, 32 ALR3d 1330.

Judgment in action on express contract for labor or services as precluding, as a matter of res judicata, subsequent action on implied contract (quantum meruit) or vice versa, 35 ALR3d 874.

Modern views of state courts as to whether consent judgment is entitled to res judicata or collateral estoppel effect, 91 ALR3d 1170.

Judgment in death action as precluding subsequent personal injury action by potential beneficiary of death action, or vice versa, 94 ALR3d 676.

### 9-12-43. Parol evidence admissible.

Parol evidence shall be admissible to show that a matter apparently covered by a judgment was not really passed upon by the court. (Orig. Code 1863, § 2839; Code 1868, § 2847; Code 1873, § 2898; Code 1882, § 2898; Civil Code 1895, § 3743; Civil Code 1910, § 4337; Code 1933, § 3-608.)

## JUDICIAL DECISIONS

**Cited** in Mortgage Bond & Trust Co. v. (1932); Keith v. Darby, 104 Ga. App. 624, Colonial Hill Co., 175 Ga. 150, 165 S.E. 25 122 S.E.2d 463 (1961).

## ARTICLE 3

### DORMANCY AND REVIVAL OF JUDGMENTS

### 9-12-60. When judgment becomes dormant; how dormancy prevented; docketing; applicability.

(a) A judgment shall become dormant and shall not be enforced:



(1) When seven years shall elapse after the rendition of the judgment before execution is issued thereon and is entered on the general execution docket of the county in which the judgment was rendered;

(2) Unless entry is made on the execution by an officer authorized to levy and return the same and the entry and the date thereof are entered by the clerk on the general execution docket within seven years after issuance of the execution and its record; or

(3) Unless a bona fide public effort on the part of the plaintiff in execution to enforce the execution in the courts is made and due written notice of such effort specifying the time of the institution of the action or proceedings, the nature thereof, the names of the parties thereto, and the name of the court in which it is pending is filed by the plaintiff in execution or his attorney at law with the clerk and is entered by the clerk on the general execution docket, all at such times and periods that seven years will not elapse between such entries of such notices or between such an entry and a proper entry made as prescribed in paragraph (2) of this subsection.

(b) The record of the execution made as prescribed in paragraph (1) of subsection (a) of this Code section or of every entry as prescribed in paragraph (2) or (3) of subsection (a) of this Code section shall institute a new seven-year period within which the judgment shall not become dormant, provided that when an entry on the execution or a written notice of public effort is filed for record, the execution shall be recorded or rerecorded on the general execution docket with all entries thereon. It shall not be necessary in order to prevent dormancy that such execution be entered or such entry be recorded on any other docket.

(c) When an entry on an execution or a written notice of public effort is filed for record and the original execution is recorded in a general execution docket other than the current general execution docket, the original execution shall be rerecorded in the current general execution docket with all entries thereon. When an original execution is so rerecorded, a notation shall be made upon the original execution which states that it has been rerecorded and gives the book and page number where the execution has been rerecorded. When an original execution is so rerecorded in the current general execution docket, it shall be indexed in the current general execution docket in the same manner as if it were an original execution. Nothing in this subsection shall affect the priority of any judgment or lien; and no judgment or lien shall lose any priority because an execution is rerecorded.

(d) The provisions of subsection (a) of this Code section shall not apply to judgments or orders for child support or spousal support. (Laws 1823, Cobb's 1851 Digest, p. 498; Ga. L. 1855-56, p. 233, § 8;



Code 1863, § 2855; Code 1868, § 2863; Code 1873, § 2914; Code 1882, § 2914; Ga. L. 1884-85, p. 95, § 1; Civil Code 1895, §§ 3761, 3762, 3763; Ga. L. 1910, p. 121, § 1; Civil Code 1910, §§ 4355, 4356, 4357; Ga. L. 1920, p. 81, §§ 1, 3; Code 1933, § 110-1001; Ga. L. 1955, p. 417, § 1; Ga. L. 1965, p. 272, § 1; Ga. L. 1984, p. 22, § 9; Ga. L. 1984, p. 912, § 1; Ga. L. 1997, p. 1613, § 2.)

**Law reviews.** — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).  
For note discussing the procedure for the issuance and amendment of a writ of execution, see 12 Ga. L. Rev. 814 (1978).

For comment as to applicability of dormancy and revival statutes to alimony judgments, in light of *Bryant v. Bryant*, 232 Ga. 160, 205 S.E.2d 223 (1974), see 26 Mercer L. Rev. 356 (1974).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
ENTRY ON EXECUTION  
ENFORCEMENT OF EXECUTION

General Consideration

**This section applies to any judgment rendered after 1910.** *Clark v. Shouse*, 149 Ga. 59, 99 S.E. 31 (1919).  
**Object of this section** is to notify creditors and purchasers of the existence of the plaintiff's claim. *Tanner v. Hollingsworth*, 41 Ga. 133 (1870).  
**Purpose and intent.** — Purpose and intention of the General Assembly in requiring an entry of levy or other entry effect of which would be to prevent an execution from becoming dormant is to serve as a protection to the public so that any person interested could go to the original entry of the recording of the execution and determine whether or not the execution had become dormant. *Pope v. United States Fid. & Guar. Co.*, 198 Ga. 304, 31 S.E.2d 602 (1944), later appeal, 200 Ga. 69, 35 S.E.2d 899 (1945).

**This section refers solely to enforceability** and is unrelated to suits of any kind. *Watkins v. Conway*, 221 Ga. 374, 144 S.E.2d 721 (1965), *aff'd*, 385 U.S. 188, 87 S. Ct. 357, 17 L. Ed. 2d 286 (1966).  
**Orders granting administrators leave to sell property.** — This article has no reference to orders or judgments by the court of ordinary (now probate court) granting to administrators leave to sell

property. *Hall v. Findley*, 188 Ga. 487, 4 S.E.2d 211 (1939).  
**Entry of tax execution within seven-year period.** — Construing together former Code 1933, §§ 92-7701, 92-7702, and 110-1001 (see now O.C.G.A. §§ 9-12-60, 48-3-21, and 48-3-22), it was the intention of the General Assembly to provide that the mere entry of a tax execution on the general execution docket within the seven-year period would prevent dormancy. *Darby v. De Loach*, 190 Ga. 499, 9 S.E.2d 626 (1940) (decided prior to revision by Ga. L. 1955, p. 417, § 1, and Ga. L. 1965, p. 272, § 1).  
**Action time-barred.** — Trial court properly found that an action to enforce a Florida judgment entered against a judgment debtor was time-barred under Georgia law, granting the judgment debtor's motion the stay enforcement of that judgment, as the statute of limitations on enforcement of the Florida judgment had run under the law of Georgia, the receiving state, when viewed from the date of rendition of the judgment in the State of Florida, the state in which the judgment originated; moreover, to run the Georgia time limitation from the date of the filing of the judgment rather than from the date of rendition of the judgment would be contrary to the language of the Uniform



**General Consideration (Cont'd)**

Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., and of Georgia's dormancy-of-judgment and judgment-renewal statutes, O.C.G.A. §§ 9-12-60 and 9-12-61. *Corzo Trucking Corp. v. West*, 281 Ga. App. 361, 636 S.E.2d 39 (2006).

Corporation and two individuals could not enforce a 1985 Florida judgment, which was renewed in 2006, in Georgia pursuant to the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., because by their operation in tandem, O.C.G.A. §§ 9-12-60(a)(1) and 9-12-61 created a 10-year statute of limitation for the enforcement of Georgia judgments and O.C.G.A. § 9-12-132 did not allow a Florida judgment to have a longer life than a Georgia judgment. *Corzo Trucking Corp. v. West*, 296 Ga. App. 399, 674 S.E.2d 414 (2009).

**An order of a court for insolvent costs** was not a judgment as contemplated under former Code 1933, §§ 110-1001 — 110-1003 (see now O.C.G.A. §§ 9-12-60 and 9-12-61) even though it was a judgment when placed on the minutes of the court. *Walden v. Bale*, 78 Ga. App. 226, 50 S.E.2d 844 (1948).

**When the execution is not filed**, the judgment will become dormant within seven years after the judgment's rendition. *United States v. Jenkins*, 141 F. Supp. 499 (S.D. Ga. 1956), aff'd, 238 F.2d 83 (5th Cir. 1956), appeal dismissed, 352 U.S. 1029, 77 S. Ct. 595, 1 L. Ed. 2d 598 (1957).

Trial court erred in granting summary judgment to a judgment debtor in a judgment creditor's action, seeking to revive an original judgment, or to declare that a prior revival action was proper for purposes of reviving that original judgment as the original judgment became dormant seven years after the judgment was entered when the creditor had not caused execution to issue, pursuant to O.C.G.A. § 9-12-60, but the creditor had filed the revival action under O.C.G.A. § 9-12-61 within three years of the dormancy, which was timely; pursuant to applicable rules of statutory construction, O.C.G.A.

§ 1-3-1(b), the Court of Appeals of Georgia, Fourth Division, concluded that the General Assembly intended that dormant judgments could be revived during a three-year period thereafter by bringing an action into existence, i.e., filing an action. *Magnum Communs. Ltd. v. Samoluk*, 275 Ga. App. 177, 620 S.E.2d 439 (2005).

**Minority of one of the defendants does not prevent the bar from attaching**, but the minor is entitled to bring an action to revive at any time within three years after the disability is removed. *Williams v. Merritt*, 109 Ga. 213, 34 S.E. 312 (1899). But see *Betts v. Hancock*, 27 Ga. App. 63, 107 S.E. 377 (1921).

**Action to revive dormant tax execution.** — Former Code 1933, § 110-1001 (see now O.C.G.A. § 9-12-60) had no application to an action to revive a "dormant tax execution" under former Code 1933, §§ 92-7701 and 92-7702 (see now O.C.G.A. §§ 48-3-21 and 48-3-22). *Oxford v. Generator Exch., Inc.*, 99 Ga. App. 290, 108 S.E.2d 174 (1959).

**No distinction made between enforcement by execution and enforcement by contempt.** — Language of this section does not permit a distinction between enforcement by execution and enforcement by contempt. *Zerblis v. Zerblis*, 239 Ga. 715, 238 S.E.2d 381 (1977).

**Section inapplicable to action to enforce arbitration award.** — State law afforded no reasonably applicable rule as to the proper time limitation for a union's action to enforce an arbitration award rendered under the terms of a collective bargaining agreement; therefore, the six-month limitation period found in § 10(b) of the National Labor Relations Act was adopted. *Samples v. Ryder Truck Lines*, 755 F.2d 881 (11th Cir. 1985).

**Agreement between workers' compensation claimant and employer.** — This section is not applicable to an agreement between a workers' compensation claimant and the claimant's employer approved by the State Board of Workers' Compensation. *Nation v. Pacific Employers Ins. Co.*, 112 Ga. App. 380, 145 S.E.2d 265 (1965).

**Revival of dormant judgment in workers' compensation cases.** — In an



action wherein a workers' compensation claimant revived a lump-sum judgment of \$37,747.08 plus accrued interest, which had become dormant against an employer, the trial court properly refused to amend the 2006 judgment that revived it to provide for weekly disability payments as the term of court ended and, therefore, the trial court had no authority to amend or alter that 2006 judgment. However, the trial court should have issued a writ of execution for the payments that became due after July 27, 2000, as those payments had not become dormant. *Taylor v. Peachbelt Props.*, 293 Ga. App. 335, 667 S.E.2d 117 (2008).

**Judgment perfecting a claimed lien of a materialman** is within this section. *Carter-Moss Lumber Co. v. Short*, 66 Ga. App. 300, 18 S.E.2d 61 (1941).

**Decree in equity case for payment of money.** — This section will apply in an equity case, when the decree is “for the payment of money,” and not for the recovery of specific property or for the performance of some act or duty, even though the decree for the collection of an unliquidated claim in the amount determined by the decree may be in rem to the extent that it creates and establishes a special lien against particular property when no such lien previously existed. *Collier v. Bank of Tupelo*, 190 Ga. 598, 10 S.E.2d 62 (1940).

**Money prerequisite to application.** — This section does not apply to decrees which are not for the payment of money. *Wall v. Jones*, 62 Ga. 725 (1879); *Cain v. Farmer*, 74 Ga. 38 (1884); *Brown v. Parks*, 190 Ga. 540, 9 S.E.2d 897 (1940).

Portion of a divorce decree, which held that the former wife held shares of stock in a “resulting trust” for the former husband, was not dormant and could be enforced by the husband’s estate because O.C.G.A. § 9-12-60 only applied to judgments for money. *Barker v. Whittington* (In re Barker), No. 07-70036-WLH, 2010 Bankr. LEXIS 4005 (Bankr. N.D. Ga. Oct. 26, 2010).

**Inapplicability to post judgment divorce contempt proceeding.** — Trial court did not err by refusing to dismiss an ex-wife’s contempt action against her ex-husband seeking to enforce his finan-

cial obligations with regard to a mortgage and a vehicle pursuant to the judgment of divorce on the basis that the parties’ November 1998 divorce decree had become dormant by the time the ex-wife filed for contempt in March 2009 because the dormancy clause under O.C.G.A. § 9-12-60 did not apply to a judgment that required the performance of an act or duty, and the divorce decree required the ex-husband to perform specific acts and did not involve the payment of a sum of money. *Baker v. Schrimsher*, 291 Ga. 489, 731 S.E.2d 646 (2012).

**Unexecuted judgment for a writ of possession** was not a dormant judgment that could be revived; O.C.G.A. § 9-12-60 applies only to judgments or decrees ordering the payment of a sum of money. *Mathis v. Hegwood*, 212 Ga. App. 335, 441 S.E.2d 766 (1994).

**This section does not apply to judgments on the foreclosure of mortgages.** *Butt v. Maddox*, 7 Ga. 495 (1849); *Fowler v. Bank of Americus*, 114 Ga. 417, 40 S.E. 248 (1901); *Redding v. Anderson*, 144 Ga. 100, 86 S.E. 241 (1915).

**Specific performance decrees are excepted from this section.** *Conway v. Caswell*, 121 Ga. 254, 48 S.E. 956, 2 Ann. Cas. 269 (1904).

**Filing of an Alabama child support order in a Georgia court was not viewed as a traditional action on a foreign judgment**, but was more appropriately governed by the Uniform Interstate Family Support Act (UIFSA), O.C.G.A. § 19-11-100 et seq.; in a Georgia arrearage proceeding under UIFSA, the statute of limitation under the laws of Georgia or of the issuing state, whichever was longer, governed, and since the Alabama period for dormancy of judgments was longer than that of Georgia, Alabama law applied. *Bodenhamer v. Wooten*, 265 Ga. App. 733, 595 S.E.2d 592 (2004).

**Child support and spousal support orders.** — Subsection (d) of O.C.G.A. § 9-12-60, which removes child support and spousal support orders from the definition of dormant judgments, will not be applied retroactively. *Brown v. Brown*, 269 Ga. 724, 506 S.E.2d 108 (1998).

**Judgments filed under the Uniform Enforcement of Foreign Judgments**



**General Consideration (Cont'd)**

**Law** are subject to a stay of execution if the judgments are dormant under subsection (a) of O.C.G.A. § 9-12-60. *Aetna Ins. Co. v. Williams*, 237 Ga. App. 881, 517 S.E.2d 109 (1999).

**This section applies to a decree for alimony in a divorce suit.** *Landis v. Sanner*, 146 Ga. 606, 91 S.E. 688 (1917); *Bryant v. Bryant*, 232 Ga. 160, 205 S.E.2d 223 (1974); *Stanley v. Stanley*, 138 Ga. App. 560, 226 S.E.2d 800 (1976), later appeal, 141 Ga. App. 411, 233 S.E.2d 454 (1977).

**Decree for alimony payable in installments** is a judgment within the provisions of this section. *O'Neil v. Williams*, 232 Ga. 170, 205 S.E.2d 226 (1974). But see *Cleveland v. Cleveland*, 197 Ga. 746, 30 S.E.2d 605 (1944).

Decree for alimony, payable in installments, is not a judgment within the meaning of this section fixing a time when judgments shall become dormant unless an execution be issued thereon; nor is it a judgment within the meaning of the statute limiting the time within which a dormant judgment may be revived by scire facias. *Cleveland v. Cleveland*, 197 Ga. 746, 30 S.E.2d 605 (1944). But see *O'Neil v. Williams*, 232 Ga. 170, 205 S.E.2d 226 (1974).

Installment-payment alimony judgments that became due within seven years preceding issuance and recording of the execution are collectible and enforceable. *Bryant v. Bryant*, 232 Ga. 160, 205 S.E.2d 223 (1974); *O'Neil v. Williams*, 232 Ga. 170, 205 S.E.2d 226 (1974).

Portion of a divorce decree, which ordered the payment of \$12,500 per month for 120 months, was not dormant because each installment was a new judgment, and not all of the obligations were more than ten years old. *Barker v. Whittington* (In re Barker), No. 07-70036-WLH, 2010 Bankr. LEXIS 4005 (Bankr. N.D. Ga. Oct. 26, 2010).

**Lump-sum alimony judgment** is dormant after the expiration of seven years and is not subject to revival after the expiration of ten years. *Bryant v. Bryant*, 232 Ga. 160, 205 S.E.2d 223 (1974).

**Installment payments of alimony judgments that are dormant**, having

become due seven to ten years prior to the filing of a revival action, are subject to being revived through the applicable statutory revival procedure. *Bryant v. Bryant*, 232 Ga. 160, 205 S.E.2d 223 (1974).

**Use of contempt to enforce an alimony judgment** should be as restrained as the use of execution. *Zerblis v. Zerblis*, 239 Ga. 715, 238 S.E.2d 381 (1977).

**Former Code 1933, § 3-805 (see now O.C.G.A. § 9-3-94) had no reference to the period of time in which a judgment became dormant** when not kept in life in any manner specified by former Code 1933, § 110-1001 (see now O.C.G.A. § 9-12-60). *Tift v. Bank of Tifton*, 60 Ga. App. 563, 4 S.E.2d 495 (1939).

**Effect of section regarding removal of defendant from state.** — Former Code 1933, § 3-805 (see now O.C.G.A. § 9-3-94) related to causes of action when personal service or its legal substitute was required in the bringing of an action. It had no reference to, nor did it repeal, the plain provisions of former Code 1933, § 110-1001 (see now O.C.G.A. § 9-12-60) in respect to dormant judgments. *Crawford v. Boyd*, 62 Ga. App. 885, 10 S.E.2d 144 (1940).

**Period of limitation as to tax executions** does not begin to run until the date fixed for the issuance of the execution. *Sharpe v. City of Waycross*, 185 Ga. 208, 194 S.E. 522 (1937).

**Claims for taxes should be enforced within seven years** from the date when the taxes are due and when executions could have been issued therefor unless within such time an execution is issued and entered on the general execution docket, as in the case of judgments. *Suttles v. Dickey*, 192 Ga. 382, 15 S.E.2d 445 (1941).

**Dormant judgment as to debt.** — Before the term expires for reviving a dormant judgment it is evidence of the debt; but one which can be enforced only after revival or action of debt thereon. *Williams v. Price*, 21 Ga. 507 (1857); *Groves v. Williams*, 68 Ga. 598 (1882).

**Application to bankruptcy proceeding.** — Under O.C.G.A. § 9-12-60, the existence of a valid judgment lien created a right to enforce that judgment, whereas the lapse of that lien deprived the



creditor of the right to enforce the judgment; thus, any act required to renew the judgment constituted a continuation of the civil action against the debtor, and not merely the maintenance of the creditor's lien as the bankruptcy trustee contended, and the creditor was thus allowed an extension of time to renew the lien pursuant to 11 U.S.C. § 108. *Wessinger v. Raab* (In re Greenberg), 288 B.R. 612 (Bankr. S.D. Ga. 2002).

Debtor's objection to the creditor's amended proof of claim was sustained and the creditor's claim was allowed as general unsecured since: (1) the creditor admitted that over seven years elapsed since the judgment was recorded and that the state court judgment was dormant when the debtor filed for bankruptcy; (2) by stipulation of the parties, the judgment became dormant nearly one full year before the debtor sought bankruptcy relief; (3) because the debtor filed the bankruptcy petition after the seven-year period established by O.C.G.A. § 9-12-60 expired, the creditor's judgment lien was invalid and unenforceable on the filing date; (4) the automatic stay barred the creditor from renewing or reviving the creditor's lien post-petition; and (5) relief from the stay would not have resurrected the creditor's secured status because the law was clear that the lien as revived attached only as of the date of the revival. *Beckham v. A & W Oil & Tire Co.* (In re Beckham), No. 03-10499, 2004 Bankr. LEXIS 1574 (Bankr. S.D. Ga. Sept. 15, 2004) (Unpublished).

**Application to action against shareholder for piercing corporate veil.** — Employer's complaint alleged against one of the employer's shareholders for piercing the corporate veil was not subject to a seven-year statute of limitations under O.C.G.A. § 9-12-60 as the employee failed to first obtain a judgment against the employer and then file a separate action to pierce the corporate veil, but instead filed an amended complaint against that shareholder over six years after the original complaint was filed. *Pazur v. Belcher*, 272 Ga. App. 456, 612 S.E.2d 481 (2004).

**One suing upon an administrator's bond makes a prima facie case** by introducing a dormant judgment, binding

on the estate, together with an entry of nulla bona, made prior to the dormancy. *Johnson v. Huggins*, 7 Ga. App. 553, 67 S.E. 217 (1910).

**Judgment is the official and authentic decision of a court of justice** upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination. *Oxford v. Generator Exch., Inc.*, 99 Ga. App. 290, 108 S.E.2d 174 (1959).

**When running of statute of limitation commences upon enforcement of a judgment.** — Statute of limitations upon the enforcement of a judgment begins to run from the time when the judgment could be first enforced, which, in the case of a judgment which is appealed to the Court of Appeals and affirmed, is the time when the remittitur from that court is filed with the clerk of the trial court. *Copeland v. Pope*, 90 Ga. App. 304, 83 S.E.2d 40 (1954).

**Waiver of affirmative defense.** — In an answer to the husband's motion for contempt, the wife did not raise dormancy as a defense to the obligation to comply with the provisions of the parties' 1988 divorce decree with regard to paying the husband a share of the marital home equity in the amount of \$22,000 after the wife remarried, therefore, the wife was deemed to have waived the affirmative defense; the reviewing court found that the wife only invoked O.C.G.A. § 9-12-60 after the trial court found that the wife was in contempt, when the wife filed post-judgment motions for new trial and to set aside, not when the wife answered the contempt motion. *Corvin v. Debter*, 281 Ga. 500, 639 S.E.2d 477 (2007).

**Cited in** *Central Bank v. Williams*, 17 Ga. 193 (1855); *Darsey v. Mumpford*, 58 Ga. 119 (1877); *Turner v. Grubbs*, 58 Ga. 278 (1877); *Wall v. Jones*, 62 Ga. 725 (1879); *Orr v. Morrow*, 91 Ga. 148, 17 S.E. 287 (1893); *Formby v. Schackleford*, 94 Ga. 670, 21 S.E. 711 (1894); *Lewis v. Smith*, 99 Ga. 603, 27 S.E. 162 (1896); *Blue & Stewart v. Collins*, 109 Ga. 341, 34 S.E. 598 (1899); *Nowell v. Haire*, 116 Ga. 386, 42 S.E. 719 (1902); *Rountree v. Jones*, 124 Ga. 395, 52 S.E. 325 (1905); *Georgia R.R. & Banking v. Wright*, 124 Ga. 596, 53 S.E. 251 (1906); *Dunlap Hdwe. Co. v.*



**General Consideration (Cont'd)**

Tharp, 2 Ga. App. 63, 58 S.E. 398 (1907); Aldridge v. Cole, 136 Ga. 593, 71 S.E. 891 (1911); Craven v. Martin, 140 Ga. 651, 79 S.E. 568 (1913); Ray v. Atlanta Trust & Banking Co., 147 Ga. 265, 93 S.E. 418 (1917); English v. Williams, 29 Ga. App. 467, 116 S.E. 40 (1923); Towers v. City Land Co., 31 Ga. App. 612, 121 S.E. 701 (1924); Dunson v. First Nat'l Bank, 175 Ga. 79, 164 S.E. 815 (1932); Latham & Sons v. Hester, 181 Ga. 100, 181 S.E. 573 (1935); Ryals v. Widencamp, 184 Ga. 190, 190 S.E. 353 (1937); James v. Roberts, 55 Ga. App. 755, 191 S.E. 301 (1937); Pie v. Hardin, 185 Ga. 331, 195 S.E. 165 (1938); Webb v. City of Atlanta, 186 Ga. 430, 198 S.E. 50 (1938); Page v. Jones, 186 Ga. 485, 198 S.E. 63 (1938); Calhoun v. Williamson, 189 Ga. 65, 5 S.E.2d 41 (1939); Interstate Bond Co. v. Cullars, 189 Ga. 283, 5 S.E.2d 756 (1939); Pope v. United States Fid. & Guar. Co., 200 Ga. 69, 35 S.E.2d 899 (1945); Franklin v. Mobley, 73 Ga. App. 245, 36 S.E.2d 173 (1945); Georgia Sec. Co. v. Sanders, 74 Ga. App. 295, 39 S.E.2d 570 (1946); Weatherly v. Parr, 74 Ga. App. 526, 40 S.E.2d 445 (1946); Rust v. Producers Coop. Exch., Inc., 81 Ga. App. 260, 58 S.E.2d 435 (1950); Hartley v. Wooten, 81 Ga. App. 506, 59 S.E.2d 325 (1950); Howard v. Pate, 108 Ga. App. 50, 131 S.E.2d 852 (1963); Hogan v. Scott, 109 Ga. App. 799, 137 S.E.2d 575 (1964); Anthony v. Anthony, 120 Ga. App. 261, 170 S.E.2d 273 (1969); McCreary v. Wright, 132 Ga. App. 500, 208 S.E.2d 373 (1974); Mitchell v. Chastain Fin. Co., 141 Ga. App. 512, 233 S.E.2d 829 (1977); Turner v. Wood, 162 Ga. App. 674, 292 S.E.2d 558 (1982); Cronic v. Chambers Lumber Co., 249 Ga. 722, 292 S.E.2d 852 (1982); Malloy v. First Ga. Bank, 178 Ga. App. 797, 344 S.E.2d 679 (1986); Cravey v. L'Eggs Prods., Inc., 100 Bankr. 119 (Bankr. S.D. Ga. 1989); Sussman v. Sussman, 301 Ga. App. 397, 687 S.E.2d 644 (2009).

**Entry on Execution**

**"Entry" must be in county in which judgment was rendered.** — Paragraphs (a)(1) and (a)(2) of O.C.G.A. § 9-12-60, when read together and in the context of the remainder of the statute, make plain

that the "entry" referred to in paragraph (a)(2) must be in the county in which the judgment was rendered, and not just any county. *Bennett Elec. Co. v. Spears*, 188 Ga. App. 502, 373 S.E.2d 286 (1988).

**Paragraph (a)(2) of this section is mandatory;** and the burden is as much upon the owner of a judgment who desires to preserve the judgment's existence to see to it that the clerk dates the entry as the clerk makes the entry as it is for owner to see to it that the clerk enters the judgment upon the proper docket. *Oliver v. James*, 131 Ga. 182, 62 S.E. 73 (1908).

**This section requires a proper entry by an officer** on the general execution docket every seven years. *Hollis v. Lamb*, 114 Ga. 740, 40 S.E. 751 (1902); *Easterlin v. New Home Sewing Mach. Co.*, 115 Ga. 305, 41 S.E. 595 (1902).

Judgment will become dormant and unenforceable unless entry is made on the execution by an officer authorized to levy and return the judgment, and such entry and the date thereof are entered by the clerk on the general execution docket within seven years after the issuance of the execution and its record. *Odum v. Peterson*, 170 Ga. 666, 153 S.E. 757 (1930); *A.B. Farquhar Co. v. Myers*, 194 Ga. 220, 21 S.E.2d 432 (1942).

**Absolute bar to enforcement after ten years.** — This section operates as an absolute bar to enforcement of a judgment when ten years elapse from the date of the last entry. *Johnson v. Huggins*, 7 Ga. App. 553, 67 S.E. 217 (1910).

**Date when the record is made on the execution docket should be clear and unequivocal,** for the time of the record upon the execution docket is the all-important fact from which to determine the question of dormancy. *Dunlap Hdwe. Co. v. Tharp*, 2 Ga. App. 63, 58 S.E. 398 (1907).

**Proper recording of entries on execution required.** — Entries upon an execution cannot serve to keep the judgment in life unless the entries are properly recorded. *Columbus Fertilizer Co. v. Hanks*, 119 Ga. 950, 47 S.E. 222 (1904); *Shaw v. Walker*, 25 Ga. App. 642, 104 S.E. 23, cert. denied, 25 Ga. App. 841 (1920).

**Timely entry of levy on execution mandatory.** — Entry of levy on an execu-



tion within seven years from the timely entry of the execution on the general execution docket of the county in which the judgment was rendered will not suffice to keep the judgment alive. In order for such an entry to be effective in preventing dormancy the entry must be entered on the general execution docket within seven years from the time of the previous effective entry on such docket. *Bryant v. Freeman*, 65 Ga. App. 590, 16 S.E.2d 113 (1941).

**Any entry upon the execution is sufficient** which will serve to charge or discharge the officer whose duty it is to execute the process. *Hatcher v. A. Gammell & Co.*, 49 Ga. 576 (1873).

**Where entry to be recorded.** — Entries made within seven years must be recorded on the original record of the execution. This requirement is not satisfied by an entry in the same execution docket but on a page far removed from the page on which the execution is recorded. The provision of the statute in this respect is met only when such entry is recorded on the original record of the execution, which means on the same page and at the same place in the execution docket where the original record appears. *A.B. Farquhar Co. v. Myers*, 194 Ga. 220, 21 S.E.2d 432 (1942).

**Second record of entry on the execution shall be made on the general execution docket** of the date the return is filed, with the date of such record entered by the clerk, in addition to the entry which is made on the docket of the date that no such second return shall be made on the general execution docket if the date that the entry is filed is less than seven years from the date of the execution. *Odum v. Peterson*, 170 Ga. 666, 153 S.E. 757 (1930).

**Entry by the clerk that the clerk has given the execution to the sheriff** is immaterial. *Daniels v. Haynes*, 91 Ga. 123, 16 S.E. 649 (1883).

**Nulla bona entry not a proceeding in court.** — Nulla bona entry or entries made by a sheriff or other levying officer and entered on the general execution docket cannot be construed to be a proceeding in the courts. *Scott v. Napier*, 85 Ga. App. 268, 69 S.E.2d 111 (1952).

**Depositing the execution in the clerk's office and having an entry of filing made thereon** is ineffective unless the execution is actually entered on the docket. *Suttles v. Dickey*, 192 Ga. 382, 15 S.E.2d 445 (1941).

**Nulla bona entry by the sheriff on the execution** will not stop the statute from running, unless it is also made on the general execution docket. *General Disct. Corp. v. Chunn*, 188 Ga. 128, 3 S.E.2d 65 (1939).

**Recording not sufficient to prevent running of dormancy period.** — Recording of a nulla bona entry, more than seven years after the original record of the execution, without re-recording the execution, was not sufficient to prevent the running of the dormancy statute. *Scott v. Napier*, 85 Ga. App. 268, 69 S.E.2d 111 (1952).

**Date must be apparent on document itself.** — Date when the recording on the docket takes place must appear from the inspection of the docket itself. *Oliver v. James*, 131 Ga. 182, 62 S.E. 73 (1908); *Craven v. Martin*, 140 Ga. 651, 79 S.E. 568 (1913).

**Issuing and entry of a void execution** is the same as if no execution were issued and entered on the records. *Ray v. Atlanta Trust & Banking Co.*, 147 Ga. 265, 93 S.E. 418 (1917).

**Preventing dormancy of judgment obtained in justice of the peace court.** — When a judgment is obtained in a justice of the peace court, in order to prevent dormancy the execution and entries are to be recorded upon the superior court execution docket, not upon the general execution docket. *Rountree v. Jones*, 124 Ga. 395, 52 S.E. 325 (1905); *Ingram v. Jackson Mercantile Co.*, 2 Ga. App. 218, 58 S.E. 372 (1907); *Columbus Fertilizer Co. v. Hanks*, 119 Ga. 950, 47 S.E. 222 (1940).

**Entry on superior court execution docket necessary even as between parties.** — Entry on the superior court execution docket is necessary to prevent the running of this section's dormancy clause even as between the parties. *Smith, Barry & Co. v. Bearden*, 117 Ga. 822, 45 S.E. 59 (1903). But for general execution docket, see *Young v. Covington Co.*, 152



**Entry on Execution (Cont'd)**

Ga. 803, 111 S.E. 196 (1922).

**Enforcement of Execution**

**Bona fide public effort of the plaintiff to enforce the plaintiff's execution** will prevent the judgment from becoming dormant. *First Nat'l Bank v. McCaskill*, 27 Ga. App. 391, 108 S.E. 819 (1921).

Bona fide public effort which will suffice to prevent dormancy is one which appears on the public docket of a court. *Bryant v. Freeman*, 65 Ga. App. 590, 16 S.E.2d 113 (1941).

**Any public act sufficient.** — Any public act of a plaintiff going to show that the execution was still in life would be sufficient to prevent the judgment from becoming dormant. *Oliver v. James*, 131 Ga. 182, 62 S.E. 73 (1908).

**Receipt for costs entered upon a writ of fieri facias** by the magistrate is sufficient to prevent the dormancy of a judgment. *Gholston v. O'Kelley*, 81 Ga. 19, 7 S.E. 107 (1888).

**Payment of costs and turning execution over to a levying officer** were not bona fide public efforts on the part of the plaintiff as would prevent the running of the statute or the dormancy of the judgment under paragraph (a)(3) of this section. *U-Driv-It Sys. v. Lyles*, 71 Ga. App. 70, 30 S.E.2d 111 (1944).

**When the validity of the execution was defended**, the rule against dormancy was applied. *Hanks v. Pearce*, 96 Ga. 159, 22 S.E. 676 (1895); *Smith v. Zachry*, 1 Ga. App. 344, 57 S.E. 1011 (1907).

**When the plaintiff defends the execution in a claim case**, dormancy of the judgment is prevented. *Beck v. Hamilton*, 113 Ga. 273, 38 S.E. 754 (1901).

**Judgment in rem, entered for enforcing a preexisting lien**, is not to become dormant under this article, which relates only to liens created by the judgment. Manifestly, a lien which the judgment does not create, this article should not take away. *Collier v. Bank of Tupelo*, 190 Ga. 598, 10 S.E.2d 62 (1940).

**Dormancy of a judgment may be taken advantage of by the defendant** as against the plaintiff or the plaintiff's assigns. *Columbus Fertilizer Co. v. Hanks*, 119 Ga. 950, 47 S.E. 222 (1904).

**Death of a claimant, pending a case** will not operate to prevent dormancy of a judgment. *Beck v. Hamilton*, 113 Ga. 273, 38 S.E. 754 (1901).

**Action filed and never dismissed.** — Action filed and never dismissed may not constitute a pending suit amounting to a bona fide public effort to enforce collection sufficient to prevent dormancy. While the filing of pleadings designed to enforce collection of the judgment may constitute a new starting point for the seven-year period, if nothing further appears of record and no attempt is made to prosecute the action for a period of more than seven years, and no sufficient legal justification for the inaction appears, this section will not be tolled by the mere existence of such pleadings. *A.B. Farquhar Co. v. Myers*, 194 Ga. 220, 21 S.E.2d 432 (1942).

**Public acts of the plaintiff need not be entered on record.** *Hollis v. Lamb*, 114 Ga. 740, 40 S.E. 751 (1902); *First Nat'l Bank v. McCaskill*, 27 Ga. App. 391, 108 S.E. 819 (1921).

**OPINIONS OF THE ATTORNEY GENERAL**

**Recording of second nulla bona on tax execution.** — In recording the second nulla bona on a tax execution, the execution should be recorded together with entries of both the first and second nulla bonas thereon. 1960-61 Op. Att'y Gen. p. 489.

**Tax lien.** — Tax lien is created by the issuance of a tax execution, or writ of fieri facias, and such lien exists for seven years

but not against innocent bona fide purchasers for value while the execution is unrecorded; entry of the execution upon the general execution docket revives the lien for an additional seven-year period and is effective against all subsequent purchasers, dating from such entry or recording; a nulla bona entry made prior to the expiration of the seven-year period on such execution would revive the lien



but only if such entry is also entered or reentered, as the case may be, upon the execution docket or other books upon which executions and entries are required to be entered or reentered. 1969 Op. Att'y Gen. No. 69-114.

**As to cancellation of security deeds and writs of execution from record,** see 1972 Op. Att'y Gen. No. U72-79.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 46 Am. Jur. 2d, Judgments, § 385 et seq.

**C.J.S.** — 49 C.J.S., Judgments, § 851 et seq.

**ALR.** — Death of one of two or more judgment creditors under a joint judgment as affecting judgment, 100 ALR 814; 122 ALR 752.

Construction, application, and effect of statutory provision for revival of judgment on failure of title of purchaser at execution sale, 115 ALR 549.

Counterclaim or setoff as defense to

proceeding to revive judgment, 131 ALR 802.

Matters antecedent to, or contemporaneous with, entry of judgment, as defense to proceeding or action to revive it, 138 ALR 863.

Failure to revive judgment against a number jointly, as to some of them, as making applicable the rule that a release of one is a release of all, 160 ALR 678.

Ancillary proceedings as suspending or removing bar of statute of limitations as to judgment, 166 ALR 767.

### 9-12-61. Dormant judgments renewed by action or scire facias; time of renewal.

When any judgment obtained in any court becomes dormant, the same may be renewed or revived by an action or by scire facias, at the option of the holder of the judgment, within three years from the time it becomes dormant. (Laws 1823, Cobb's 1851 Digest, p. 498; Code 1863, §§ 2855, 3522; Code 1868, §§ 2863, 3545; Code 1873, §§ 2914, 3604; Code 1882, §§ 2914, 3604; Civil Code 1895, §§ 3761, 5378; Ga. L. 1910, p. 121, § 1; Civil Code 1910, §§ 4355, 5973; Code 1933, §§ 110-1002, 110-1003.)

**Law reviews.** — For note discussing the procedure for the issuance and

amendment of a writ of execution, see 12 Ga. L. Rev. 814 (1978).

### JUDICIAL DECISIONS

**This section refers solely to enforceability** and is unrelated to suits of any kind. *Watkins v. Conway*, 221 Ga. 374, 144 S.E.2d 721 (1965), aff'd, 385 U.S. 188, 87 S. Ct. 357, 17 L. Ed. 2d 286 (1966).

**Purpose of this section** is to enable a judgment creditor to revive a dormant judgment. *Mitchell v. Chastain Fin. Co.*, 141 Ga. App. 512, 233 S.E.2d 829 (1977).

**This section operates as a statute of limitations.** *Johnson v. Huggins*, 7 Ga. App. 553, 67 S.E. 217 (1910).

**Timeliness.** — Trial court erred in granting summary judgment to a judgment debtor in a judgment creditor's action, seeking to revive an original judgment, or to declare that a prior revival action was proper for purposes of reviving that original judgment as the original judgment became dormant seven years after the judgment was entered when the creditor had not caused execution to issue, pursuant to O.C.G.A. § 9-12-60, but the creditor had filed the revival action under



O.C.G.A. § 9-12-61 within three years of the dormancy, which was timely; pursuant to applicable rules of statutory construction, O.C.G.A. § 1-3-1(b), the Court of Appeals of Georgia, Fourth Division, concluded that the General Assembly intended that dormant judgments could be revived during a three-year period thereafter by bringing an action into existence, i.e., filing an action. *Magnum Communs. Ltd. v. Samoluk*, 275 Ga. App. 177, 620 S.E.2d 439 (2005).

**Foreign judgments.** — Dormant judgments may be revived under this section, but this section does not authorize the revival of a foreign judgment. *Retirement Credit Plan, Inc. v. Melnick*, 139 Ga. App. 570, 228 S.E.2d 740 (1976).

Trial court properly found that an action to enforce a Florida judgment entered against a judgment debtor was time-barred under Georgia law, granting the judgment debtor's motion to stay enforcement of that judgment as the statute of limitations on enforcement of the Florida judgment had run under the law of Georgia, the receiving state, when viewed from the date of rendition of the judgment in the State of Florida, the state in which the judgment originated; moreover, to run the Georgia time limitation from the date of the filing of the judgment rather than from the date of rendition of the judgment would be contrary to the language of the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., and of Georgia's dormancy-of-judgment and judgment-renewal statutes, O.C.G.A. §§ 9-12-60 and 9-12-61. *Corzo Trucking Corp. v. West*, 281 Ga. App. 361, 636 S.E.2d 39 (2006).

Corporation and two individuals could not enforce a 1985 Florida judgment, which was renewed in 2006, in Georgia pursuant to the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., because by their operation in tandem, O.C.G.A. §§ 9-12-60(a)(1) and 9-12-61 created a ten year statute of limitation for the enforcement of Georgia judgments and O.C.G.A. § 9-12-132 did not allow a Florida judgment to have a longer life than a Georgia judgment. *Corzo Trucking Corp. v. West*, 296 Ga. App. 399, 674 S.E.2d 414 (2009).

**Section applicable to federal judgment.** — Ever since the effective date of the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., the provision of O.C.G.A. § 9-12-61 for revival of a dormant judgment is applicable to revive a dormant federal judgment. *Smith v. State*, 218 Ga. App. 429, 461 S.E.2d 553 (1995).

**Writ should have been issued after revival of dormant judgment in workers' compensation case.** — In an action wherein a workers' compensation claimant revived a lump-sum judgment of \$37,747.08 plus accrued interest, which had become dormant against an employer, the trial court properly refused to amend the 2006 judgment that revived it to provide for weekly disability payments as the term of court ended and, therefore, the trial court had no authority to amend or alter that 2006 judgment. However, the trial court should have issued a writ of execution for the payments that became due after July 27, 2000, as those payment had not become dormant. *Taylor v. Peachbelt Props.*, 293 Ga. App. 335, 667 S.E.2d 117 (2008).

**Action to revive dormant tax execution.** — Former Code 1933, §§ 110-1001 — 110-1003 (see now O.C.G.A. §§ 9-12-60 and 9-12-61) have no application to an action to revive a "dormant tax execution" under former Code 1933, §§ 92-7701 and 92-7702 (see now O.C.G.A. §§ 48-3-21 and 48-3-22). *Oxford v. Generator Exch., Inc.*, 99 Ga. App. 290, 108 S.E.2d 174 (1959).

**Application to bankruptcy proceeding.** — Debtor's objection to the creditor's amended proof of claim was sustained and the creditor's claim was allowed as general unsecured since: (1) the creditor admitted that over seven years elapsed since the judgment was recorded and that the state court judgment was dormant when the debtor filed for bankruptcy; (2) by stipulation of the parties, the judgment became dormant nearly one full year before the debtor sought bankruptcy relief; (3) because the debtor filed the bankruptcy petition after the seven-year period established by O.C.G.A. § 9-12-60 expired, the creditor's judgment lien was invalid and unenforceable on the filing date; (4) the automatic



stay barred the creditor from renewing or reviving the creditor's lien post-petition; and (5) relief from the stay would not have resurrected the creditor's secured status because the law was clear that the lien as revived attached only as of the date of the revival. *Beckham v. A & W Oil & Tire Co.* (In re Beckham), No. 03-10499, 2004 Bankr. LEXIS 1574 (Bankr. S.D. Ga. Sept. 15, 2004) (Unpublished).

**While an order of a court for insolvent costs was a judgment** when placed on the minutes of the court, it was not such a judgment as contemplated under former Code 1933, §§ 110-1001 — 110-1003 (see now O.C.G.A. §§ 9-12-60 and 9-12-61). *Walden v. Bale*, 78 Ga. App. 226, 50 S.E.2d 844 (1948).

**Unrecorded judgment as well as recorded judgment may be renewed** by action or by scire facias within three years from the time it becomes dormant. *Watkins v. Citizens & S. Nat'l Bank*, 163 Ga. App. 468, 294 S.E.2d 703 (1982), aff'd sub nom. *Watkins v. C. & S. Emory Bank*, 250 Ga. 29, 301 S.E.2d 892 (1983).

**Applicability of law regarding entry of judgments.** — Except for determining whether or not a judgment has been dormant, the provisions of O.C.G.A. § 9-11-58, pertaining to entry of judgment, are immaterial in an action for renewal of a dormant judgment. *Watkins v. Citizens & S. Nat'l Bank*, 163 Ga. App. 468, 294 S.E.2d 703 (1982), aff'd sub nom. *Watkins v. C. & S. Emory Bank*, 250 Ga. 29, 301 S.E.2d 892 (1983).

**Judgment rendered in this state becomes dormant** and cannot be enforced if seven years elapse before execution is issued thereon and entered on the general execution docket of the court wherein such judgment is rendered. *Odum v. Peterson*, 170 Ga. 666, 153 S.E. 757 (1930).

**Entry on execution must be made by authorized officers.** — Judgment likewise becomes dormant if seven years shall elapse at any time after the execution is issued thereon without an entry on the execution by an officer authorized to execute and return the execution and such entry recorded on the docket. *Odum v. Peterson*, 170 Ga. 666, 153 S.E. 757 (1930).

**Second record of entry on the execution** shall be made on the general exe-

cution docket of the date the return is filed, with the date of such record entered by the clerk, in addition to the entry which is made on the docket of the date that the execution was originally entered; but no such second return shall be made on the general execution docket if the date that the entry is filed is less than seven years from the date of the execution. *Odum v. Peterson*, 170 Ga. 666, 153 S.E. 757 (1930).

**Dormant judgment renewable as matter of right.** — Although a judgment is dormant and has, therefore, lost its lien, it is still a subsisting debt and the judgment can be renewed as a matter of right by scire facias or by suit. *Hagins v. Blitch*, 6 Ga. App. 839, 65 S.E. 1082 (1909).

**Renewed suit fileable despite laches.** — Although the defendants may have been guilty of laches for belated service in the original suit, that suit was merely voidable rather than void, such that a renewed suit was fileable following voluntary dismissal of the original suit. *Wells v. Faust*, 206 Ga. App. 818, 426 S.E.2d 655 (1992).

**Scire facias to revive a judgment is not an original action**, but the continuation of the suit in which the judgment was obtained, and may be used by a plaintiff to revive a dormant judgment. *Fielding v. M. Rich & Bros. Co.*, 46 Ga. App. 785, 169 S.E. 383 (1933).

**Scire facias to be used to revive judgment.** — If the right to revive a judgment is barred by this section, that issue should be raised by an appropriate plea to the scire facias. *Walker v. Turner*, 203 Ga. 525, 47 S.E.2d 504 (1948).

**Defending against scire facias.** — Defendant is absolutely precluded from going behind the judgment and offering in defense to the scire facias any matter which existed before rendition of the original judgment and which might have been presented in the former proceeding. *Mitchell v. Chastain Fin. Co.*, 141 Ga. App. 512, 233 S.E.2d 829 (1977).

**During dormancy there is no presumption in favor of defendant that the judgment has been paid**, but such presumption exists only as to third persons. *Hagins v. Blitch*, 6 Ga. App. 839, 65 S.E. 1082 (1909).



**Action of debt will lie upon a dormant judgment** in this state. *Lockwood v. Barefield*, 7 Ga. 393 (1849).

**Garnishment will also lie upon a dormant judgment.** *Bridges v. North*, 22 Ga. 52 (1857).

**In reviving a dormant judgment, interest is to be counted** during the period of dormancy as well as for the rest of the time. *Wilcher v. Hamilton*, 15 Ga. 435 (1854).

**Proof of execution not necessary.** — It is not necessary, in a suit to revive a dormant judgment, for the plaintiff to prove that an execution issued thereon is not vital and effective. If such is the fact, it is a matter of defense. *Reynolds v. Lyon*, 20 Ga. 225 (1856).

**Bank was not required to make a bona fide effort to collect a judgment** against the bank's debtor as a condition precedent to the filing of a proceeding to revive or renew the judgment. *Mallory v. First Ga. Bank*, 178 Ga. App. 797, 344 S.E.2d 679 (1986).

**Justice of the peace courts may revive their judgments.** In reviving a judgment in a justice of the peace court, it is not necessary that the justice presiding should be the same justice who presided when the judgment was rendered. It is not necessary that the applicant to revive a justice of the peace court judgment should accompany the application with an affidavit that the judgment has not been satisfied. *Wilcher v. Hamilton*, 15 Ga. 435 (1854).

**Issuance of alias execution not sufficient to revive dormant judgment.** — When a judgment is dormant or dead, issuance of an alias execution in lieu of the lost original execution which issued on the judgment does not revive the judgment. *U-Driv-It Sys. v. Lyles*, 71 Ga. App. 70, 30 S.E.2d 111 (1944).

**Order granting leave to sue is not an order of revival of a judgment,** whether or not the plaintiff had a right to revive. It may be a final order but it is not a final foreign money judgment which the plaintiff is seeking to have made into a judgment in this state. *Retirement Credit Plan, Inc. v. Melnick*, 139 Ga. App. 570, 228 S.E.2d 740 (1976).

**Nunc pro tunc orders cannot rescue judgments from dormancy.** — Af-

ter a judgment becomes dormant for any reason, although the judgment may be revived in a proper action for that purpose brought within the time prescribed by this section it cannot be rescued from dormancy by mere nunc pro tunc orders entered upon the execution. *Georgia Sec. Co. v. Sanders*, 74 Ga. App. 295, 39 S.E.2d 570 (1946).

**If a judgment creditor seeks by scire facias to keep a judgment in force then** the judgment creditor must proceed against all the defendants and revive the specific judgment. If the judgment creditor selects the other method, namely, a new action on the judgment, the judgment creditor need join only such as the judgment creditor elects to join. *American Nat'l Bank v. Hodges*, 41 Ga. App. 717, 154 S.E. 653 (1930).

**Decree for alimony, payable in installments,** was not a judgment within the meaning of former Code 1933, § 110-1001 (see now O.C.G.A. § 9-12-60) fixing a time when judgments shall become dormant unless an execution was issued thereon; nor was it a judgment within the meaning of former Code 1933, §§ 110-1002 and 110-1003 (see now O.C.G.A. § 9-12-61) limiting the time within which a dormant judgment may be revived by scire facias. *Cleveland v. Cleveland*, 197 Ga. 746, 30 S.E.2d 605 (1944). (But see *Bryant v. Bryant*, 232 Ga. 160, 205 S.E.2d 223 (1974); *O'Neil v. Williams*, 232 Ga. 170, 205 S.E.2d 226 (1974)).

**No revival based on contempt.** — Filing of wife's citation for contempt did not constitute an "action" under O.C.G.A. § 9-12-61 so as to revive the dormant judgment. *Parker v. Eason*, 265 Ga. 236, 454 S.E.2d 460 (1995).

**Revival of dormant installment payments of alimony judgments.** — Installment payments of alimony judgments that are dormant, having become due seven to ten years prior to the filing of a revival action, are subject to becoming revived through the applicable statutory revival procedure. *Bryant v. Bryant*, 232 Ga. 160, 205 S.E.2d 223 (1974); *O'Neil v. Williams*, 232 Ga. 170, 205 S.E.2d 226 (1974). (But see *Cleveland v. Cleveland*, 197 Ga. 746, 30 S.E.2d 605 (1944)).

**Child support.** — Child support judgments are subject to statutes regarding



dormancy even though the enforcement of these judgments is by means of a contempt action. *Parker v. Eason*, 265 Ga. 236, 454 S.E.2d 460 (1995).

Filing of an Alabama child support order in a Georgia court was not viewed as a traditional action on a foreign judgment, but was more appropriately governed by the Uniform Interstate Family Support Act (UIFSA), O.C.G.A. § 19-11-100 et seq.; in a Georgia arrearage proceeding under UIFSA, the statute of limitation under the laws of Georgia or of the issuing state, whichever was longer, governed, and since the Alabama period for dormancy of judgments was longer than that of Georgia, Alabama law applied. *Bodenhamer v. Wooten*, 265 Ga. App. 733, 595 S.E.2d 592 (2004).

**Child support arrearages** which accrued prior to the date of the adoption of the children were revived by a court granting the claimant's application for scire facias and were not eradicated by adoption of the children. *Wannamaker v. Carr*, 257 Ga. 634, 362 S.E.2d 53 (1987).

**Cited** in *Rawson v. Thornton*, 43 Ga.

537 (1871); *Latham & Sons v. Hester*, 181 Ga. 100, 181 S.E. 573 (1935); *James v. Roberts*, 55 Ga. App. 755, 191 S.E. 301 (1937); *Trust Co. v. Mortgage-Bond Co.*, 203 Ga. 461, 46 S.E.2d 883 (1948); *Rust v. Producers Coop. Exch., Inc.*, 81 Ga. App. 260, 58 S.E.2d 435 (1950); *United States v. Jenkins*, 141 F. Supp. 499 (S.D. Ga. 1956); *Howard v. Pate*, 108 Ga. App. 50, 131 S.E.2d 852 (1963); *Hogan v. Scott*, 109 Ga. App. 799, 137 S.E.2d 575 (1964); *Jeffries v. Federal Employees Credit Union*, 113 Ga. App. 673, 149 S.E.2d 417 (1966); *Stanley v. Stanley*, 141 Ga. App. 411, 233 S.E.2d 454 (1977); *Kight v. Behringer*, 192 Ga. App. 62, 383 S.E.2d 624 (1989); *Bowers v. Jim Rainwater Bldr. & Properties, Inc.*, 203 Ga. App. 254, 416 S.E.2d 832 (1992); *Brown v. Brown*, 269 Ga. 724, 506 S.E.2d 108 (1998); *Popham v. Jordan*, 278 Ga. App. 254, 628 S.E.2d 660 (2006); *Sussman v. Sussman*, 301 Ga. App. 397, 687 S.E.2d 644 (2009); *Barker v. Whittington* (In re *Barker*), No. 07-70036-WLH, 2010 Bankr. LEXIS 4005 (Bankr. N.D. Ga. Oct. 26, 2010).

OPINIONS OF THE ATTORNEY GENERAL

**As to cancellation of security deeds and writs of execution from record**, see 1972 Op. Att'y Gen. No. U72-79.

RESEARCH REFERENCES

**Am. Jur. 2d.** — 46 Am. Jur. 2d, Judgments, § 331 et seq.

**C.J.S.** — 49 C.J.S., Judgments, § 740 et seq.

**ALR.** — Suspension, or removal of bar, of statute of limitations as against judgment, 21 ALR 1038; 166 ALR 768.

Running of limitations against proceeding to renew or revive judgment as affected by appeal or right of appeal from

judgment, or by motion or right to move for new trial, 123 ALR 565.

Ancillary proceedings as suspending or removing bar of statute of limitations as to judgment, 166 ALR 767

Validity, and applicability to causes of action not already barred, of a statute enlarging limitation period, 79 ALR2d 1080.

9-12-62. Nature of scire facias.

Scire facias to revive a judgment is not an original action but is the continuation of the action in which the judgment was obtained. (Orig. Code 1863, § 3524; Code 1868, § 3547; Code 1873, § 3606; Code 1882, § 3606; Civil Code 1895, § 5380; Civil Code 1910, § 5975; Code 1933, § 110-1005.)



**Law reviews.** — For note discussing the procedure for the issuance and

amendment of a writ of execution, see 12 Ga. L. Rev. 814 (1978).

### JUDICIAL DECISIONS

**Revival proceedings are designed to protect not only the relationships and rights of plaintiffs,** but also those of the defendants. *American Nat'l Bank v. Hodges*, 41 Ga. App. 717, 154 S.E. 653 (1930).

**Venue of scire facias proceeding.** — Scire facias to revive a dormant judgment must be brought in the superior court of the county in which the original judgment was obtained. *Oxford v. Generator Exch., Inc.*, 99 Ga. App. 290, 108 S.E.2d 174 (1959).

**Defenses to scire facias must be pled.** — Scire facias to revive a dormant judgment is in the nature of a suit and the defendant is bound to plead all matters of defense that the defendant has, just as the defendant would in an ordinary suit. *Lewis v. Allen*, 68 Ga. 398 (1882).

**Compliance with O.C.G.A. § 9-12-63 required.** — After conceding that the judgment creditor allowed a judgment against a judgment debtor to become dormant, the trial court did not err in denying the creditor's petition for a writ of scire facias upon the creditor's failure to comply with the procedural filing requirements of O.C.G.A. § 9-12-63 and service upon the judgment debtor was not properly effectuated. *Popham v. Jordan*, 278 Ga. App. 254, 628 S.E.2d 660 (2006).

**Defenses to scire facias cannot go behind the judgment.** — It is a good defense to a scire facias that the defendant was not served as required and did not in any way appear in the original suit. When the record of a court, whether because lost or otherwise, is silent as to service, and a duly entered judgment appears thereon, it will be presumed, until the contrary appears, that service under this section was made on the defendant; but the defendant is, as a general rule, competent to testify in rebuttal of this presumption. *Weaver v. Webb, Galt & Kellogg*, 3 Ga. App. 726, 60 S.E. 367 (1908).

**Inquiry into merits of original case on writ to revive it.** — In no case, and

under no circumstances, can the merits of an original judgment be inquired into by the defendant on a writ to revive the judgment. *McRae v. Boykin*, 73 Ga. App. 67, 35 S.E.2d 548 (1945), cert. denied, 328 U.S. 844, 66 S. Ct. 1024, 90 L. Ed. 1618 (1946).

When a defendant is served, and appears and pleads in the original action, the defendant cannot inquire into the merits of the original judgment, on a writ to revive the judgment. It is not error to sustain a demurrer (now motion to dismiss) and strike the defendant's answer in such a proceeding. *McRae v. Boykin*, 73 Ga. App. 67, 35 S.E.2d 548 (1945), cert. denied, 328 U.S. 844, 66 S. Ct. 1024, 90 L. Ed. 1618 (1946).

**Res adjudicata applies to scire facias proceedings.** — On the general principle of res adjudicata, which applies equally to proceedings by scire facias as to any other action or suit, and on the further ground that this method of reviving a judgment is a supplementary step in the original action, the defendant is absolutely precluded from going behind the judgment and offering in defense to the scire facias any matter which existed before the rendition of the original judgment and which might have been presented in the former proceeding. *McRae v. Boykin*, 73 Ga. App. 67, 35 S.E.2d 548 (1945), cert. denied, 328 U.S. 844, 66 S. Ct. 1024, 90 L. Ed. 1618 (1946).

**Discharge in bankruptcy is a proper defense** to scire facias to revive a judgment, and if not set up the defendant will be concluded by a judgment of revival. *Thomas v. Towns*, 66 Ga. 78 (1880).

**Lien revived by scire facias.** — Lien revived by scire facias only attaches as of the date of the revival. *Beckham v. A & W Oil & Tire Co.* (In re Beckham), No. 03-10499, 2004 Bankr. LEXIS 1574 (Bankr. S.D. Ga. Sept. 15, 2004) (Unpublished).

**Consideration of record.** — Upon a petition for scire facias to revive a dormant judgment, wherein the plaintiff al-



leges that the judgment was rendered in a named cause in the same court, a transcript of which is not attached as an exhibit, but full reference to the cause is prayed, and the defendant by the defendant's pleadings invokes a construction of the record in aid of the defense, the defendant cannot complain that the court considered such record in determining whether the judgment was void for uncertainty, or whether it was final or interlocutory. *Moody v. Muscogee Mfg. Co.*, 134 Ga. 721, 68 S.E. 604, 20 Ann. Cas. 301 (1910).

**Effect of scire facias proceedings on judgment not dormant.** — Proceeding by scire facias to revive a judgment charged, and believed to be dormant, though it was not so in point of fact, did not prevent the judgment from becoming dormant. *Vanderberg, Bonnett & Co. v. Threlkeld*, 61 Ga. 16 (1878).

**Amendable defect not objected to curable by verdict.** — When the petition for revival of a judgment was defective, since the petition should have been

brought in the name of the original plaintiff suing for the use of the transferee, this, being an amendable defect to which there was no demurrer (now motion to dismiss) or other objection upon the trial, was cured by the verdict. *Walker v. Turner*, 203 Ga. 525, 47 S.E.2d 504 (1948).

**Effect of permitting revival of judgment against one of several defendants.** — To permit a plaintiff to have revival of judgment against one only of several defendants might destroy the right of the defendant, thus made liable for the whole to contribution from the codefendants, and a surety of the indemnity as well, if the defendant has paid the obligation of the principal, and so by nonaction and laches a judgment creditor might deliberately defeat contribution or indemnity. *American Nat'l Bank v. Hodges*, 41 Ga. App. 717, 154 S.E. 653 (1930).

**Cited in** *Stahle v. Jones*, 60 Ga. App. 397, 3 S.E.2d 861 (1939); *Trust Co. v. Mortgage-Bond Co.*, 203 Ga. 461, 46 S.E.2d 883 (1948).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 46 Am. Jur. 2d, Judgments, §§ 393, 394.

**C.J.S.** — 49 C.J.S., Judgments, § 867.

9-12-63. Issuance of scire facias; copies; service; return.

A scire facias to revive a dormant judgment in the courts must issue from and be returnable to the court of the county in which the judgment was obtained. It shall be directed to all and singular the sheriffs of this state and shall be signed by the clerk of such court who shall make out copies thereof. An original and a copy shall issue for each county in which any party to be notified resides. A copy shall be served by the sheriff of the county in which the party to be notified resides 20 days before the sitting of the court to which the scire facias is made returnable and the original shall be returned to the clerk of the court from which it issued. (Orig. Code 1863, § 3525; Code 1868, § 3548; Code 1873, § 3607; Code 1882, § 3607; Civil Code 1895, § 5381; Civil Code 1910, § 5976; Code 1933, § 110-1006.)

JUDICIAL DECISIONS

**Whole judgment must be revived, and not a part of the judgment.** *Funderburk v. Smith*, 74 Ga. 515 (1885).

**Parties to action to revive original judgment.** — All parties to the original judgment must be parties to the proceed-



ing to renew or revive it, and if one of them has removed from the state, that one should be made a party and be served by publication. *Funderburk v. Smith*, 74 Ga. 515 (1885).

**Personal service required.** — This section contemplates personal service. Service by leaving a copy at the most notorious place of abode of the defendant is not sufficient. *Atwood v. Hirsch*, 123 Ga. 734, 51 S.E. 742 (1905); *Fielding v. M. Rich & Bros. Co.*, 46 Ga. App. 785, 169 S.E. 383 (1933); *Strickland v. Willingham*, 49 Ga. App. 355, 175 S.E. 605 (1934).

**Service within less than the time prescribed by this section is a nullity.** The mere service of an order to continue a case for the purpose of perfecting service would not supply the place of the service of the scire facias. *Donaldson v. Dodd*, 79 Ga. 763, 4 S.E. 157 (1887); *Fielding v. M. Rich & Bros. Co.*, 46 Ga. App. 785, 169 S.E. 383 (1933).

**When improper service can be perfected through amendment by court.** — When a petition for the writ of scire facias to revive a dormant judgment was filed and process issued requiring the defendant to appear on a date which was less than 20 days before the sitting of the court to which the petition was return-

able, and the defendant made a motion to dismiss the petition because the petition was not served within the time required by law and the trial judge amended the petition and process and the defendant was served with a copy thereof more than 20 days before the next term of the court, a motion to dismiss the petition for scire facias because not served according to law was properly overruled. *Fielding v. M. Rich & Bros. Co.*, 46 Ga. App. 785, 169 S.E. 383 (1933).

**Compliance.** — After conceding that the judgment creditor allowed a judgment against a judgment debtor to become dormant, the trial court did not err in denying the creditor's petition for a writ of scire facias upon the creditor's failure to comply with the procedural filing requirements of O.C.G.A. § 9-12-63 and service upon the judgment debtor was not properly effectuated. *Popham v. Jordan*, 278 Ga. App. 254, 628 S.E.2d 660 (2006).

**Venue.** — Scire facias is to be brought in the court where the judgment was rendered. *Funderburk v. Smith*, 74 Ga. 515 (1885); *Oxford v. Generator Exch., Inc.*, 99 Ga. App. 290, 108 S.E.2d 174 (1959).

**Cited in** *Hogan v. Scott*, 109 Ga. App. 799, 137 S.E.2d 575 (1964).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 46 Am. Jur. 2d, Judgments, §§ 391 et seq., 407 et seq.

**C.J.S.** — 49 C.J.S., Judgments, § 867.

### 9-12-64. Revival on motion after service of scire facias; when defendant entitled to jury trial.

In all cases of scire facias to revive a judgment, when service has been perfected, the judgment may be revived on motion at the first term without the intervention of a jury unless the person against whom judgment was entered files an issuable defense under oath, in which case the defendant in judgment shall be entitled to a trial by jury as in other cases. (Orig. Code 1863, § 3527; Code 1868, § 3550; Code 1873, § 3609; Code 1882, § 3609; Civil Code 1895, § 5383; Civil Code 1910, § 5978; Code 1933, § 110-1008.)



## JUDICIAL DECISIONS

**Inquiry into merits of original action by writ to revive.** — In no case can the merits of an original judgment be inquired into by the defendant on a writ to revive the judgment. *McRae v. Boykin*, 73 Ga. App. 67, 35 S.E.2d 548 (1945), cert. denied, 328 U.S. 844, 66 S. Ct. 1024, 90 L. Ed. 1618 (1946).

When a defendant is served and appears and pleads in the original suit, the defendant cannot inquire into the merits of the original judgment on a writ to revive the judgment. It is not error to sustain a demurrer (now motion to dismiss) and strike the defendant's answer in such a proceeding. *McRae v. Boykin*, 73 Ga. App. 67, 35 S.E.2d 548 (1945), cert. denied, 328 U.S. 844, 66 S. Ct. 1024, 90 L. Ed. 1618 (1946).

**Revival of judgment must be pled against all defendants.** — Right to a revival of the judgment against all the defendants being a mere personal right of each defendant, the defendant must avail of it in answer to the writ of scire facias to

revive the judgment; a scire facias being in the nature of a suit in which it is incumbent upon the defendant to plead. *American Nat'l Bank v. Hodges*, 41 Ga. App. 717, 154 S.E. 653 (1930).

**Res adjudicata applies to scire facias proceeding.** — On the general principle of res adjudicata, which applies equally to proceedings by scire facias as to any other action or suit, and on the further ground that this method of reviving a judgment is merely a supplementary step in the original action, the defendant is absolutely precluded from going behind the judgment and offering in defense to the scire facias any matter which existed before the rendition of the original judgment and which might have been presented in the former proceeding. *McRae v. Boykin*, 73 Ga. App. 67, 35 S.E.2d 548 (1945), cert. denied, 328 U.S. 844, 66 S. Ct. 1024, 90 L. Ed. 1618 (1946).

**Cited in** *Fielding v. M. Rich & Bros. Co.*, 46 Ga. App. 785, 169 S.E. 383 (1933).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 46 Am. Jur. 2d, Judgments, § 405 et seq.

**C.J.S.** — 49 C.J.S., Judgments, § 867.

## 9-12-65. Scire facias when judgment transferred.

When a judgment has been transferred, the scire facias shall issue in the name of the original holder of the judgment for the use of the transferee. (Orig. Code 1863, § 3528; Code 1868, § 3551; Code 1873, § 3610; Code 1882, § 3610; Civil Code 1895, § 5384; Civil Code 1910, § 5979; Code 1933, § 110-1009; Ga. L. 1982, p. 3, § 9.)

## JUDICIAL DECISIONS

**Amendable defect not objected to curable by verdict.** — When the petition for revival of a judgment was defective, since the petition should have been brought in the name of the original plaintiff suing for the use of the transferee, this, being an amendable defect to which there was no demurrer (now motion to dismiss) or other objection upon the trial,

was cured by the verdict. *Walker v. Turner*, 203 Ga. 525, 47 S.E.2d 504 (1948).

**Effect of misnomer in scire facias petition.** — Judgment obtained by revival of a dormant judgment by scire facias in the name of a plaintiff as transferee, instead of in the name of the original plaintiff, suing for the use of the transferee, as required by this section,



cannot be treated as a void judgment, unless it appears that the court rendering such judgment did not have jurisdiction. *Chapman v. Taliaferro*, 1 Ga. App. 235, 58 S.E. 128 (1907).

**Cited** in *Trust Co. v. Mortgage-Bond Co.*, 203 Ga. 461, 46 S.E.2d 883 (1948).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 46 Am. Jur. 2d, Judgments, § 431 et seq.

**C.J.S.** — 49 C.J.S., Judgments, § 867.

### 9-12-66. Venue of action to renew judgment.

An action to renew a dormant judgment shall be brought in the county where the defendant in judgment resides at the commencement of the action. (Orig. Code 1863, § 3523; Code 1868, § 3546; Code 1873, § 3605; Code 1882, § 3605; Civil Code 1895, § 5379; Civil Code 1910, § 5974; Code 1933, § 110-1004.)

**Law reviews.** — For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the

resolution of venue questions, see 9 Ga. St. B.J. 254 (1972).

### JUDICIAL DECISIONS

**Cited** in *Beckham v. A & W Oil & Tire Co.* (In re Beckham), No. 03-10499, 2004

Bankr. LEXIS 1574 (Bankr. S.D. Ga. Sept. 15, 2004).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 46 Am. Jur. 2d, Judgments, § 404.

**C.J.S.** — 49 C.J.S., Judgments, § 862.

### 9-12-67. Revival of judgment against nonresident; service by publication.

If the defendant in judgment or other party to be notified resides outside this state, a dormant judgment may be revived against such defendant or his representative by such process as is issued in cases in which the defendant resides in this state, provided that the defendant in judgment or other party to be notified shall be served with scire facias by publication in the newspaper in which the official advertisements of the county are published, twice a month for two months previous to the term of the court at which it is intended to revive the judgment, which service shall be as effectual in all cases as if the defendant or person to be notified had been personally served. (Laws 1850, Cobb's 1851 Digest, p. 502; Code 1863, § 3526; Code 1868, § 3549; Code 1873, § 3608; Code 1882, § 3608; Civil Code 1895, § 5382; Civil Code 1910, § 5977; Code 1933, § 110-1007; Ga. L. 1982, p. 3, § 9; Ga. L. 1984, p. 22, § 9.)



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**Effect of statute relating to removal of defendant from state.** — Former Code 1933, § 3-805 (see now O.C.G.A. § 9-3-94) had no reference to the period of time in which a judgment became dormant when not kept in life in any manner

specified by law. *Tift v. Bank of Tifton*, 60 Ga. App. 563, 4 S.E.2d 495 (1939).

**Cited** in *Strickland v. Willingham*, 49 Ga. App. 355, 175 S.E. 605 (1934); *Stanley v. Stanley*, 141 Ga. App. 411, 233 S.E.2d 454 (1977).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 46 Am. Jur. 2d, Judgments, § 412.

**C.J.S.** — 49 C.J.S., Judgments, § 859.

**ALR.** — Revival of judgment by constructive service of process upon nonresident, as affected by due process and full faith and credit clauses, 144 ALR 403.

Conclusiveness of decree assessing stockholders or policyholders of insolvent corporations or mutual insurance companies, as against nonresidents, not personally served within state in which decree was rendered, 175 ALR 1419.

9-12-68. Revival of dormant decrees for payment of money.

Decrees for the payment of money shall become dormant like other judgments when not enforced and may be revived as provided by law for other judgments. (Orig. Code 1863, § 4128; Code 1868, § 4160; Code 1873, § 4219; Code 1882, § 4219; Civil Code 1895, § 4861; Civil Code 1910, § 5434; Code 1933, § 37-1211.)

JUDICIAL DECISIONS

**Decree, in general, is of equal force with a judgment.** *Dean v. Central Cotton Press Co.*, 64 Ga. 670 (1880).

**This section applies to money judgments** but not to judgments and decrees requiring the performance of a duty. *Butler v. James*, 33 Ga. 148 (1861); *Wall v. Jones*, 62 Ga. 725 (1879); *Brown v. Parks*, 190 Ga. 540, 9 S.E.2d 897 (1940).

**Judgment foreclosing a mortgage does not become dormant.** *Wall v. Jones*, 62 Ga. 725 (1879).

**Judgments granting administrators leave to sell property.** — Former Code 1933, §§ 110-1001 and 37-1211 (see now O.C.G.A. §§ 9-12-60 and 9-12-68) have no reference to orders or judgments by the court of ordinary (now probate court) granting to administrators leave to sell property. *Hall v. Findley*, 188 Ga. 487, 4 S.E.2d 211 (1939).

**When a decree is both in personam for money and against specific property**, that part which is for money comes

within the dormancy statute, while the other does not. *Butler v. James*, 33 Ga. 148 (1861); *Wall v. Jones*, 62 Ga. 725 (1879); *Cain v. Farmer*, 74 Ga. 38 (1884); *Fowler v. Bank of Americus*, 114 Ga. 417, 40 S.E. 248 (1901); *Conway v. Caswell*, 121 Ga. 254, 48 S.E. 956, 2 Ann. Cas. 269 (1904).

**Decree in equity case for the payment of money.** — This section will apply in an equity case when the decree is “for the payment of money,” and not for the recovery of specific property or for the performance of some act or duty, even though the decree for the collection of an unliquidated claim in the amount determined by the decree may be in rem to the extent that it creates and establishes a special lien against particular property when no such lien previously existed. *Collier v. Bank of Tupelo*, 190 Ga. 598, 10 S.E.2d 62 (1940).

**Judgment in rem, entered for enforcing a preexisting lien**, is not to become dormant under this section which



relates only to liens created by the judgment. Manifestly, a lien which the judgment does not create, the dormancy judgment statutes should not take away. *Collier v. Bank of Tupelo*, 190 Ga. 598, 10 S.E.2d 62 (1940).

**Statute of limitations does not apply to a judgment for temporary alimony.** *Aliter*, as to permanent alimony.

*Fauver v. Hemperly*, 178 Ga. 424, 173 S.E. 82 (1934). But see *Bryant v. Bryant*, 232 Ga. 160, 205 S.E.2d 223 (1974).

**Cited** in *Fischer v. Fischer*, 164 Ga. 81, 137 S.E. 821 (1927); *Brown v. Parks*, 190 Ga. 540, 9 S.E.2d 897 (1940); *Stanley v. Stanley*, 141 Ga. App. 411, 233 S.E.2d 454 (1977).

## RESEARCH REFERENCES

**ALR.** — Survival statutory liability for support of relative, 96 ALR 537.

## ARTICLE 4

### JUDGMENT LIENS

**Cross references.** — Executions generally, T. 9, C. 13. Liens generally, § 44-14-320 et seq.

## RESEARCH REFERENCES

**ALR.** — Judgment lien or levy of execution on one joint tenant's share or interest as severing joint tenancy, 51 ALR4th 906.

## 9-12-80. Equal dignity and binding effect of judgments.

All judgments obtained in the superior courts, magistrate courts, or other courts of this state shall be of equal dignity and shall bind all the property of the defendant in judgment, both real and personal, from the date of such judgments except as otherwise provided in this Code. (Laws 1799, Cobb's 1851 Digest, p. 494; Laws 1810, Cobb's 1851 Digest, p. 495; Code 1863, § 3499; Code 1868, § 3522; Code 1873, § 3580; Code 1882, § 3580; Civil Code 1895, § 5351; Civil Code 1910, § 5946; Code 1933, § 110-507; Ga. L. 1983, p. 884, § 4-1.)

## JUDICIAL DECISIONS

**Former Code 1933, § 110-507 (see now O.C.G.A. § 9-12-80) was not repealed by former Code 1933, § 39-701 (see now O.C.G.A. § 9-12-81);** nor was there any conflict between the two sections when they were properly construed. *Commercial Credit Co. v. Jones Motor Co.*, 46 Ga. App. 464, 167 S.E. 768 (1933).

**Effect of O.C.G.A. § 9-12-86 is not to repeal O.C.G.A. § 9-12-80 or O.C.G.A.**

**§ 9-12-87.** While it is true that O.C.G.A. § 9-12-86, as amended, provides that all laws or parts of laws in conflict are repealed, there is no conflict which requires a repeal. *National Bank v. Morris-Weathers Co.*, 248 Ga. 798, 286 S.E.2d 17 (1982).

**Purpose of section.** — The Act of 1810 from which this section came was intended to place all judgments on the same



footing, whether obtained in the superior, inferior, or justice of the peace courts. *Watson v. Watson*, 1 Ga. 266 (1846).

**General judgment constitutes general lien.** — Lien of a general judgment, when execution issues thereon and it is properly recorded on the general execution docket, constitutes a general lien on all of the defendant's property. *Anderson v. Burnham*, 12 Bankr. 286 (Bankr. N.D. Ga. 1981).

**Creditor acquires a lien against a defendant as soon as the creditor obtains a judgment.** *In re Tinsley*, 421 F. Supp. 1007 (M.D. Ga. 1976), *aff'd*, 554 F.2d 1064 (5th Cir. 1977).

**Establishing date of trial court judgment.** — As to personal property, former Code 1933, §§ 110-506 and 110-507 (see now O.C.G.A. §§ 9-12-80 and 9-12-89) applied to establish the date of a trial court judgment as the date on which creditors obtain a lien. *In re Tinsley*, 421 F. Supp. 1007 (M.D. Ga. 1976), *aff'd*, 554 F.2d 1064 (5th Cir. 1977).

**Earlier obtained, but later domesticated foreign judgment.** — Because a foreign judgment cannot be enforced until the judgment is domesticated, a Georgia judgment had priority over an earlier obtained, but later domesticated, foreign judgment against the same debtor. *NationsBank v. Gibbons*, 226 Ga. App. 610, 487 S.E.2d 417 (1997).

**What and when property bound.** — Judgments bind all the property owned by the defendant, from their date, as well that subsequently acquired as that owned at the time of signing the judgment. *Kollock v. Jackson*, 5 Ga. 153 (1848).

Judgment lien binds all the property of the defendant in judgment including after-acquired property. *Claussen Concrete Co. v. Walker* (*In re Lively*), 74 Bankr. 238 (S.D. Ga. 1987), *aff'd*, 851 F.2d 363 (11th Cir. 1988).

**Divorce judgments are exception to the rule** that all the property of the defendant-debtors is bound from the date of the judgment; a judgment for permanent alimony does not create a lien for future monthly installments unless a lien is expressly created against the property in the alimony judgment. *Cale v. Hale*, 157 Ga. App. 412, 277 S.E.2d 770 (1981).

An ex-wife's *fieri facias* and summons of garnishment relate back to the original divorce judgment entered against her ex-husband and she takes priority as the holder of the oldest judgment; but she can take priority only in that portion of the garnishment fund which represents the ex-husband's arrearage on the date of the second creditor's judgment because she does not have a lien at the latter date for future installments that were not yet payable. *Cale v. Hale*, 157 Ga. App. 412, 277 S.E.2d 770 (1981).

One in whose favor an alimony judgment has been granted, though payable in installments, is entitled to an execution or *fieri facias* for the purpose of enforcing the judgment whenever and as often as an installment or installments become due and are unpaid; the clerk of the court is required by law to issue such *fi. fa.* on request of the plaintiff or the plaintiff's attorney, as a matter of right; and it is not essential that a judgment should be obtained from the court for that purpose. *Cale v. Hale*, 157 Ga. App. 412, 277 S.E.2d 770 (1981).

**There is an exception to the no lien rule in alimony cases** when there is an execution against the property or an attachment of the proceeds for the sale of the defendant's property for past due installments. *Cale v. Hale*, 157 Ga. App. 412, 277 S.E.2d 770 (1981).

**Lien to enforce weekly alimony payments permitted.** — When the jury provides permanent alimony for the wife in an amount capable of exact determination, a provision in the verdict that it be discharged by designated weekly payments does not prevent the court by the court's decree from providing a lien for the protection of such judgment. *Roberson v. Roberson*, 199 Ga. 627, 34 S.E.2d 836 (1945).

**It is not necessary that the verdict of a jury shall provide for establishment of a lien** to follow the judgment since the lien follows a money judgment for an amount certain as a matter of law; and this applies to a judgment for alimony. *Roberson v. Roberson*, 199 Ga. 627, 34 S.E.2d 836 (1945).

**Legal title in defendant.** — Property is bound if there is a good subsisting, legal



title in the defendant at the time of the judgment. *Ware v. Jackson*, 19 Ga. 452 (1856).

**Property is bound from the signing of the judgment** and does not relate back to the first day of the term. *Morgan v. Sims & Nance*, 26 Ga. 283 (1858); *Royal Indem. Co. v. Mayor of Savannah*, 209 Ga. 383, 73 S.E.2d 205 (1952).

**Judgment lien attaches upon property previously mortgaged** as well as upon any not so encumbered. *Green v. Coast Line R.R.*, 97 Ga. 15, 24 S.E. 814, 54 Am. St. R. 379, 33 L.R.A. 806 (1895).

**Judgment lien on real property is perfected when recorded.** — In determining that a debtor's transfer of a security interest in certain real property to a judgment creditor occurred for purposes of 11 U.S.C. § 547(b) when the creditor's judgment lien was recorded, the court applied O.C.G.A. § 9-12-86 because: (1) case law holding that an unrecorded deed had priority over a recorded judgment lien was limited to O.C.G.A. § 44-2-2 and did not prevent the application of § 9-12-86 in the instant case; (2) § 9-12-86 provided an exception to O.C.G.A. § 9-12-80's general rule that a creditor acquired a lien when judgment was entered; and (3) a trustee's imputed knowledge of a transfer was not relevant for purposes of 11 U.S.C. § 547. *Pettigrew v. Hoey Constr. Co. (In re NotJust Another CarWash, Inc.)*, No. 04-90859-MGD, 2007 Bankr. LEXIS 979 (Bankr. N.D. Ga. Feb. 15, 2007).

**Type of property which is bound.** — Judgment in a general sense binds all the property, both real and personal, of the person against whom the judgment is rendered, the lien of such judgment, in the special sense which prevents the alienation of the property of the debtor after the judgment's rendition, attaches only to such property of the debtor as is capable of seizure and sale under execution based upon such judgment. *Fidelity & Deposit Co. v. Exchange Bank*, 100 Ga. 619, 28 S.E. 393 (1897); *Ivey v. Gatlin*, 194 Ga. 27, 20 S.E.2d 592 (1942).

Former Civil Code 1910, §§ 5946 and 6057 (see now O.C.G.A. §§ 9-12-80 and 9-13-55) bind only such property of the debtor as was capable of actual seizure, sequestration, and delivery in satisfaction

of the creditor's demand. In that sense it operated as a lien upon choses in action. When moneys have been reduced to the possession of the court by the collection of choses in action, the liens of preexisting judgments attach thereto, and, upon distribution, were entitled to preference according to their dignity and priority; but the liens of such judgments cannot be held to so attach to money or choses in action as that, *proprio vigore*, they will prevent the alienation by the debtor of that class of property before some proceeding necessary to fix absolutely the lien of such judgment so as to remove the judgment from the personal dominion and control of the debtor. *Piedmont Sav. Co. v. Chapman*, 42 Ga. App. 555, 156 S.E. 638 (1931).

**Land held by absolute deed as security for a debt still unpaid** is subject to levy and sale as the property of the vendee, under a judgment against the vendee, no matter whether the judgment creditor gave credit on the faith of the property so held or not. *Parrott v. Baker*, 82 Ga. 364, 9 S.E. 1068 (1889).

**Homeowners association as judgment creditor entitled to file a lien.** — Because a judgment debtor's personal property was automatically bound by a judgment as of the date a state court judgment was rendered, O.C.G.A. §§ 9-12-80 and 44-14-320(a)(2), a homeowners' association became a judgment creditor of the homeowners upon the entry of a state court judgment and was entitled to file a lien binding the homeowners' property. *Laosebikan v. Lakemont Cmty. Ass'n*, 302 Ga. App. 220, 690 S.E.2d 505 (2010).

**Priority favors older lien.** — Plaintiff having two executions which are liens on money, in the hands of the sheriff, arising from the sale of the defendant's property, cannot apply the fund to either writ of fieri facias at the plaintiff's option; but the law appropriates the proceeds of the debtor's property to the older lien. *Louie v. Moore*, 8 Ga. 194 (1850); *Newton v. Nunnally*, 4 Ga. 356 (1848).

**Senior judgment prevails.** — Although the lien of a judgment against a shareholder in a corporation does not attach to the stock upon the rendition of the judgment, so as to prevent a transfer or



alienation of the stock by the owner, or to affect any right of the corporation, yet in a contest in the nature of a money rule over a fraud derived from the sale of stock in a corporation, pursuant to levy, when the only claimants are holders of conflicting judgments against the shareholder, the money should be applied to the senior judgment, notwithstanding levies were made under both judgments and the execution based upon the younger judgment was the first to be levied. *Piedmont Sav. Co. v. Chapman*, 42 Ga. App. 555, 156 S.E. 638 (1931).

As between the liens of the judgments rendered at different terms of the same court, the senior judgment has priority. *Fas-Pac, Inc. v. Fillingame*, 123 Ga. App. 203, 180 S.E.2d 243 (1971).

**Execution from United States Circuit Court.** — Execution issued from the Circuit Court of the United States for the districts of Georgia, the lien of which is not extinguished, can claim money in the state courts. *McNair v. Bateman & Talton*, 27 Ga. 181 (1859).

**Priority of judgment entered by lower court and appealed to higher court.** — When an appeal to the superior court from a judgment in a justice of the peace court was entered by the defendant, the latter judgment, as to priority, is to be treated as being of the date when the judgment appealed from was entered and, accordingly, it takes precedence over another judgment rendered by the superior court, older than the judgment on the appeal, but younger than the original judgment entered in the justice of the peace court. *Watkins v. Angier*, 99 Ga. 519, 27 S.E. 718 (1896).

**Holder of unrecorded judgment obtained in county other than defendant's residence.** — When a judgment is obtained against a defendant in a county other than that of the defendant's residence, and in a county in which the defendant's personal property is located, it becomes from the time of the judgment's rendition a lien on such property, under the provisions of this section, and does not fall within any of the exceptions to the statutory provisions. Hence the holder of such judgment, though it is unrecorded, has priority over a purchaser of the prop-

erty from the defendant in the judgment who buys subsequently to the rendition of the judgment, but without notice thereof. *Reynolds Banking Co. v. I.F. Peebles & Co.*, 142 Ga. 615, 83 S.E. 229 (1914); *Reynolds Banking Co. v. I.F. Peebles & Co.*, 15 Ga. App. 387, 83 S.E. 504 (1914).

**Priority of sale under junior judgment.** — Sale of property under a junior judgment and execution passes the title as against the lien of older judgments. *Dowdell v. Neal*, 10 Ga. 148 (1851).

**This section requires parties holding older judgments to interpose them** to claim the proceeds of the sale of property when sold under a junior judgment. *McNair v. Bateman & Talton*, 27 Ga. 181 (1859).

**Priority of lien of factor and judgment lien.** — Lien of judgments has precedence over and is paramount to the lien of a factor upon property in possession. *Kollock v. Jackson*, 5 Ga. 153 (1848).

**Assignment by debtor before collateral proceeding.** — Assignment of the chose in action by the debtor before the institution of a collateral proceeding or garnishment passes to the assignee the property of the debtor in the chose in action assigned, freed from the lien of a general judgment previously rendered against the assignor. *Fidelity & Deposit Co. v. Exchange Bank*, 100 Ga. 619, 28 S.E. 393 (1897).

**Effect of discharge in bankruptcy.** — Discharge in bankruptcy under the federal act did not affect the lien of a general judgment nor the lien of a mortgage obtained more than four months prior to the filing of the petition in bankruptcy, relative to property set apart as exempt under the bankrupt's claim of homestead exemption, although holders of such liens may have proved their claims in bankruptcy. *McBride v. Gibbs*, 148 Ga. 380, 96 S.E. 1004 (1918); *Georgia Sec. Co. v. Arnold*, 56 Ga. App. 532, 193 S.E. 355 (1937).

**Effect of state law on bankruptcy action.** — If a creditor had a state law right to seize and recover the property, its lien would attach to after-acquired property recovered by the bankruptcy trustee. Therefore, to determine if the creditor's judgment lien attached to the property



recoverable by the trustee as an 11 U.S.C. § 548 fraudulent transfer, the court was required to determine if the creditor had a right under state law, independent of the bankruptcy filing, to recover the property. *Coleman v. J&B Enters. (In re Veterans Choice Mortg.)*, 291 B.R. 894 (Bankr. S.D. Ga. 2003).

Debtor could not use 11 U.S.C. § 544(a)(1) to avoid a creditor's preexisting judicial lien because, under O.C.G.A. § 9-12-80, the creditor's lien arose when the judgment was obtained, approximately one year before the bankruptcy petition was filed and the debtor's hypothetical lien was created. *Natl Serv. Direct, Inc. v. Anderson (In re Nat'l Serv. Direct, Inc.)*, No. 03-76883, 2005 Bankr. LEXIS 298 (Bankr. N.D. Ga. Jan. 28, 2005).

**Discharge in bankruptcy does not affect the prior lien of a judgment** upon land set apart to the bankrupt as exempt, the creditor not having proved the debt, nor done anything to waive the creditor's lien or submit it to the jurisdiction of the bankruptcy court. *Bush v. Lester*, 55 Ga. 579 (1876).

**Judgment in trover vests the title absolutely in the plaintiff**, so far as the property itself is concerned, and when a money judgment is elected, this judgment would become a special lien upon the property sued for, and a general lien upon all other property of the defendant. *McWilliams v. Hemingway*, 80 Ga. App. 843, 57 S.E.2d 623 (1950).

**Judgment does not create lien on chose in action.** — Lien on a chose in action is created by the service of a summons of garnishment, and the lien dates from the date of the service of summons, and not from the date of the judgment. *Anderson v. Burnham*, 12 Bankr. 286 (Bankr. N.D. Ga. 1981).

**Creditor with the older judgment takes priority** over the junior creditor in the distribution of garnishment funds. *Cale v. Hale*, 157 Ga. App. 412, 277 S.E.2d 770 (1981).

**Limited partnership interest.** — Limited partner's interest is a

chose-in-action which cannot be reached by a judgment lien without garnishment or some other collateral action. *Harris v. C.C. Dickson, Inc. (In re Smith)*, 17 Bankr. 541 (Bankr. M.D. Ga. 1982); *Prodigy Centers/Atlanta v. T-C Assocs.*, 269 Ga. 522, 501 S.E.2d 209 (1998).

**Priority of judgments rendered at same term of court.** — All judgments rendered at same term of court shall be considered of equal date and no execution shall be entitled to any preference by reason of being first placed in the hands of the levying officer. *Wellington v. Lenkerd Co.*, 157 Ga. App. 755, 278 S.E.2d 458 (1981).

**Cited in** *Dennis v. Green*, 20 Ga. 386 (1856); *Toombs v. Hill*, 28 Ga. 371 (1859); *Green v. Coast Line R.R.*, 97 Ga. 15, 24 S.E. 814, 54 Am. St. R. 379, 33 L.R.A. 806 (1895); *Burt v. Gooch*, 37 Ga. App. 301, 139 S.E. 912 (1927); *Coleman v. Law*, 170 Ga. 906, 154 S.E. 445 (1930); *Sells v. Sells*, 175 Ga. 110, 165 S.E. 1 (1932); *Beam v. Rome Hdwe. Co.*, 184 Ga. 272, 191 S.E. 126 (1937); *Tanner v. Wilson*, 184 Ga. 628, 192 S.E. 425 (1937); *Bradley v. Booth*, 62 Ga. App. 770, 9 S.E.2d 861 (1940); *Shedden v. National Florence Crittenton Mission*, 191 Ga. 428, 12 S.E.2d 618 (1940); *Tilley v. King*, 193 Ga. 602, 19 S.E.2d 281 (1942); *Virginia-Carolina Chem. Co. v. Willoughby*, 66 Ga. App. 900, 19 S.E.2d 816 (1942); *Postell v. Val-Lite Corp.*, 78 Ga. App. 199, 51 S.E.2d 63 (1948); *Pethel v. Liberal Fin. Co.*, 86 Ga. App. 773, 72 S.E.2d 563 (1952); *Stephens v. Stephens*, 220 Ga. 22, 136 S.E.2d 726 (1964); *Kilgore v. Buice*, 229 Ga. 445, 192 S.E.2d 256 (1972); *White v. Georgia Farm Bureau Mut. Ins. Co.*, 234 Ga. 186, 215 S.E.2d 240 (1975); *Grossman v. Glass*, 239 Ga. 319, 236 S.E.2d 657 (1977); *Landmark First Nat'l Bank v. Schwall & Heuett*, 161 Ga. App. 356, 288 S.E.2d 331 (1982); *Williamson v. Lucas*, 78 Bankr. 372 (Bankr. M.D. Ga. 1987); *Cravey v. L'Eggs Prods., Inc.*, 100 Bankr. 119 (Bankr. S.D. Ga. 1989); *Dee v. Sweet*, 224 Ga. App. 285, 480 S.E.2d 316 (1997); *RCF Techs., Inc. v. Rubbercraft Corp. (In re RCF Techs., Inc.)*, 285 B.R. 531 (Bankr. S.D. Ga. 2001).



## OPINIONS OF THE ATTORNEY GENERAL

**Tax lien is created by the issuance of a tax execution, or writ of fieri facias,** and such lien exists for seven years but not against innocent bona fide purchasers for value while the execution is unrecorded; entry of the execution upon the general execution docket revives the lien for an additional seven-year period and is effective against all subsequent purchasers, dating from such entry or

recording; a nulla bona entry made prior to the expiration of the seven-year period on such execution would revive the lien but only if such entry is also entered or reentered, as the case may be, upon the execution docket or other books upon which executions and entries are required to be entered or reentered. 1969 Op. Att'y Gen. No. 69-114.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 46 Am. Jur. 2d, Judgments, § 8 et seq.

**C.J.S.** — 49 C.J.S., Judgments, § 637 et seq.

**ALR.** — Priority as between judgment lien and unrecorded mortgage, 4 ALR 434.

Priority of judgment over conveyance made after beginning of term but prior to rendition of judgment, 5 ALR 1072.

Judgment as lien on judgment debtor's equitable interest in real property, 30 ALR 504.

Necessity and sufficiency of notice of assignment of judgment to affect stranger dealing with real property on which the judgment is a lien, 30 ALR 820.

Grounds for vacation of satisfaction of judgment, 51 ALR 243.

Attorney's lien subject to setoff against judgment, 51 ALR 1268.

Priority as between decree for alimony and claims of other creditors, 66 ALR 1473.

Priority as between judgments of different dates as regards lien on subsequently acquired property, 67 ALR 1301.

Lien of judgment against heir or devisee as attaching to land sold by executor or administrator, 68 ALR 1479.

Expiration of period of life of judgment as affecting pending garnishment proceeding by judgment creditor against one indebted to judgment debtor, 75 ALR 1359.

Constitutionality, construction, and application of statutes empowering court to require judgment debtor to make payment out of income or by installments, 111 ALR 392.

Statute limiting duration of lien, or life, of judgment, or revival thereof, as applicable to judgment in favor of state or political units thereof, 118 ALR 929.

Lien of judgment as affected by guardianship of incompetent or infant judgment debtor, 119 ALR 1212.

Decree for periodical payments for support or alimony as a lien or the subject of a declaration of lien, 59 ALR2d 656.

Judgment lien or levy of execution on one joint tenant's share or interest as severing joint tenancy, 51 ALR4th 906.

Priority between attorney's charging lien against judgment and opposing party's right of setoff against same judgment, 27 ALR5th 764.

## 9-12-81. General execution docket; when money judgment in county of defendant's residence creates lien against third parties without notice.

(a) The clerk of superior court of each county shall be required to keep a general execution docket in paper or electronic data base form.

(b) As against the interest of third parties acting in good faith and without notice who have acquired a transfer or lien binding the



property of the defendant in judgment, no money judgment obtained within the county of the defendant's residence in any court of this state or federal court in this state shall create a lien upon the property of the defendant unless the execution issuing thereon is entered upon the execution docket. When the execution has been entered upon the docket, the lien shall date from such entry. (Ga. L. 1889, p. 106, § 2; Civil Code 1895, § 2779; Civil Code 1910, § 3321; Ga. L. 1921, p. 115, § 1; Code 1933, § 39-701; Ga. L. 1955, p. 425, § 1; Ga. L. 2012, p. 599, § 1-2/HB 665.)

**Cross references.** — Requirement that clerk maintain index to general execution docket, § 15-6-61(a)(4)(C).

**Law reviews.** — For note discussing procedures required to effect a levy of execution, see 12 Ga. L. Rev. 814 (1978).

### JUDICIAL DECISIONS

**Former Code 1933, § 110-507** (see now O.C.G.A. § 9-12-80) was not repealed by former Code 1933, § 39-701 (see now O.C.G.A. § 9-12-81), nor was there any conflict between the two sections when the statutes were properly construed. *Commercial Credit Co. v. Jones Motor Co.*, 46 Ga. App. 464, 167 S.E. 768 (1933).

**Purpose of section.** — Purpose of this section is to protect "third parties acting in good faith and without notice," and one who claims the benefit of the statute's provisions must prove that one belongs to such protected class. *Eason v. Vandiver*, 108 Ga. 109, 33 S.E. 873 (1899); *Ray v. Atlanta Trust & Banking Co.*, 147 Ga. 265, 93 S.E. 418 (1917).

Evident purpose of this section was to regulate the priority of deeds, mortgages, and other liens. *Swift & Co. v. Dowling*, 151 Ga. 449, 107 S.E. 49 (1921).

**This section has no application in a contest between mere judgment liens.** *Corley-Powell Produce Co. v. Allen*, 42 Ga. App. 641, 157 S.E. 251 (1931).

Former Code 1933, § 39-701 (see now O.C.G.A. § 9-12-81), as qualified by former Code 1933, § 39-703 (see now O.C.G.A. § 9-12-83), contemplated judgments rendered in the county of the residence of the defendant and the statute's terms were sufficiently broad to leave the lien of the judgment binding from the date of the judgment on all personal property of the defendant in every county of this state. *Bradley v. Booth*, 62 Ga. App. 770, 9 S.E.2d 861 (1940).

**In order for the judgment to be a lien upon the personal property of the defendant**, in whatever county located, the execution issuing thereon shall be entered upon the general execution docket in the county where the judgment was obtained. *Bradley v. Booth*, 62 Ga. App. 770, 9 S.E.2d 861 (1940).

**When creditor's lien becomes effective.** — Under this statute, it would seem that the creditor's lien becomes effective only upon the entry of execution on the general execution docket. Case law, however, requires an opposite conclusion. In *re Tinsley*, 421 F. Supp. 1007 (M.D. Ga. 1976), aff'd, 554 F.2d 1064 (5th Cir. 1977).

**This section protects only persons who acquire a contractual lien subsequent to a judgment;** an older, unrecorded judgment would prevail over a later judgment which had been recorded. In *re Tinsley*, 421 F. Supp. 1007 (M.D. Ga. 1976), aff'd, 554 F.2d 1064 (5th Cir. 1977).

**Common law judgment is a lien upon rendition of judgment.** — Except when subsequent bona fide purchasers are concerned, this section leaves intact the principle that a common law judgment is a lien upon rendition of judgment. In *re Tinsley*, 421 F. Supp. 1007 (M.D. Ga. 1976), aff'd, 554 F.2d 1064 (5th Cir. 1977).

**Effect of properly entered and executed general judgment lien.** — Lien of a general judgment, when execution issues thereon and is properly entered upon the execution docket, binds all of the property of the defendant. *Pethel v. Liberal*



Fin. Co., 86 Ga. App. 773, 72 S.E.2d 563 (1952); *Anderson v. Burnham*, 12 Bankr. 286 (Bankr. N.D. Ga. 1981).

**Entry of a judgment upon a justice of the peace court docket** prior to the time when this section took effect was notice to all persons dealing with the defendant of the existence of such judgment, and this notice was sufficient to put a purchaser from the defendant upon inquiry as to what disposition was made of such judgment, and, consequently, upon notice of all facts to which such inquiry, properly conducted, would lead. *Dodd & Co. v. Glover*, 102 Ga. 82, 29 S.E. 158 (1897).

**Entry not required between parties.** — As between the parties to a suit, it is not necessary that an execution be entered upon the general execution docket. *Ray v. Atlanta Trust & Banking Co.*, 147 Ga. 265, 93 S.E. 418 (1917).

O.C.G.A. § 9-12-81(b) did not apply to a situation in which the court was asked to rule on the interest of the original parties to a judicial lien and not those of a third party. *Natl Serv. Direct, Inc. v. Anderson (In re Nat'l Serv. Direct, Inc.)*, No. 03-76883, 2005 Bankr. LEXIS 298 (Bankr. N.D. Ga. Jan. 28, 2005).

**As against the rights of third parties acting in good faith**, no judgment lien is binding against the property of a defendant located in the county where the judgment is obtained, unless the judgment is entered in the general execution docket as provided by this article but nothing as there provided shall be construed to affect the validity or force of any deed, or mortgage, or judgment, or other lien of any kind as between the parties thereto. *Roberson v. Roberson*, 199 Ga. 627, 34 S.E.2d 836 (1945).

In a declaratory judgment action brought by the purchasers of certain real property to remove a cloud from the purchasers' title asserted by a bank who had obtained a writ of fieri facias (the lien) against one of the sellers, the trial court erred by granting summary judgment to the bank and holding that the purchasers had a duty to inquire as to prior names used by that seller. The purchasers provided expert testimony that the lien using that seller's married name had not been

recorded and, in turn, the bank failed to present any evidence to dispute the affidavits of the purchasers' witnesses or to cite to any authority which imposed a duty on the purchasers or the purchasers' agents to investigate prior or alternative names of that seller when nothing occurred prior to or during the closing that created a duty to inquire and that seller had falsely sworn under oath that the property was not subject to any encumbrances or liens and that there were no outstanding judgments. *Gallagher v. Buckhead Cmty. Bank*, 299 Ga. App. 622, 683 S.E.2d 50 (2009), cert. denied, No. S09C2080, 2010 Ga. LEXIS 2 (Ga. 2010).

**Interest of holder of security deed.** — When a divorce decree divided real property between former spouses, and provided that certain anticipated payments by the former husband of marital debts be deducted from the former wife's share of proceeds from the sale of the property, a third-party holder of a security deed from the former wife conveying to him her undivided half interest in the real property is a bona fide purchaser for value without notice, and his interest by virtue of the security deed is superior to the interest of the former husband under the divorce decree. *Eavenson v. Parker*, 261 Ga. 607, 409 S.E.2d 520 (1991).

**Removal of a defendant from the county** in which a judgment was rendered against the defendant will not render necessary entering upon the general docket, of the county to which the defendant removes, an execution issued upon such judgment. *Smith v. Howell*, 101 Ga. 771, 29 S.E. 31 (1897).

**Effect of improperly indexed execution.** — Book kept by the clerk as a general execution docket was a substantial compliance with this section; and if in a given instance an execution was improperly indexed, and third persons were thereby misled to their injury, their remedy, if any, would be against the clerk; but the fact that the execution was so improperly entered would not prevent the entry from operating as legal notice. *Merrick v. Taylor*, 14 Ga. App. 81, 80 S.E. 343 (1913).

**From what time lien of judgments date.** — Lien of judgments, to which this section applies, dates, as to bona fide



conveyances by the debtor to third persons, only from the time the executions issuing thereon shall be entered upon the general execution docket, unless such entry is made within ten days after the judgments were rendered. *Bailey v. Bailey*, 93 Ga. 768, 21 S.E. 77 (1894).

**When innocent purchasers become bound.** — Whether or not a *lis pendens* has been filed, a lien of judgment does not attach to the property of a defendant so as to bind innocent purchasers unless and until execution is issued thereon and entered upon the general execution docket. *Evans v. Fulton Nat'l Mtg. Corp.*, 168 Ga. App. 600, 309 S.E.2d 884 (1983).

**Entry of distress warrant for rent.** — This section does not contemplate or require that a distress warrant for rent shall be entered upon the general execution docket. *Jones v. Howard*, 96 Ga. 752, 22 S.E. 291 (1895).

**Failure to register in county where debtor was located.** — Where debtor under Chapter 11 bankruptcy objected to the status of a creditor's claim as a secured claim on the grounds that the creditor's judgment was never perfected by recording on the general execution docket in the county where the debtor was located as required under Georgia law, O.C.G.A. § 9-12-81(b), the bankruptcy court noted that although the creditor had registered the creditor's judgment (obtained in a federal district court in California) in the Southern District of Georgia, 28 U.S.C. § 1962 did not override the requirements of Georgia law; accordingly, the bankruptcy court sustained the debtor's objection to the claim's secured status and allowed the claim only as a general unsecured claim. *RCF Techs., Inc. v. Rubbercraft Corp. (In re RCF Techs., Inc.)*, 285 B.R. 531 (Bankr. S.D. Ga. 2001).

**Effect of failure to enter on docket.** — Failure of the plaintiff in *fiери facias* to have a judgment obtained entered upon the general execution docket provided for by statute presents no reason for rejecting the *fiери facias* when offered in evidence upon the trial of a claim to property upon which the *fiери facias* had been levied. *Rice v. Warren*, 91 Ga. 759, 17 S.E. 1032 (1893).

**Innocent purchaser for value prevails when writ of fieri facias not**

**recorded.** — When there has been a failure to record a writ of *fiери facias* within ten days from the rendition of the judgment upon which it issued, as prescribed in this section, and thereafter the defendant in *fiери facias* before the registry of the execution, sells land to an innocent purchaser for value who has no knowledge or notice of the existence of the judgment, the title to the land passes to such purchaser from the lien of the judgment. This is true notwithstanding that the purchaser made no investigation or inquiry as to the existence of such a lien before paying for and receiving the purchaser's deed to the property. *Harvey & Brown v. Sanders*, 107 Ga. 740, 33 S.E. 713 (1899); *State Bank v. Moore*, 148 Ga. 198, 96 S.E. 225 (1918).

**Purchaser must prove that purchase made in good faith and without notice.** — As between a purchaser and plaintiff in a prior judgment, which was not followed by a duly recorded execution the burden is upon the purchaser to prove that the purchaser acted in good faith and without notice in the transaction in order to relieve the property from the lien of the judgment. *Pinson-Brunson Motor Co. v. Bank of Danielsville*, 40 Ga. App. 793, 151 S.E. 549 (1930).

**Good faith purchaser without notice prevails on money judgment.** — When one obtains a money judgment in a tort action in the superior court and fails to have an execution issued and recorded on the general execution docket in accordance with the requirements of this section, the lien of the judgment is lost as against property conveyed by the defendant in judgment to a purchaser in good faith and without notice during the pendency of the suit in which the judgment was rendered, and subsequently to the rendition of the judgment, but before the issuance and entry of an execution on the general execution docket as required by this section. *Jackson v. Faver*, 210 Ga. 58, 77 S.E.2d 728 (1953).

**When knowledge by purchaser's attorneys chargeable to purchaser.** — Fact that the attorneys for the purchaser, and therefore the purchaser, have actual knowledge of the pendency of a suit for a money judgment in a tort action will not



charge them with notice of the rendition of a judgment in that case, when no execution had been issued and recorded as provided by the statute, and they will not be chargeable with negligence, and therefore with notice, because they did not examine the papers in the suit, examine the bar docket, examine the minutes of the court, or make inquiry of the plaintiff's counsel in that case, for: "What the law requires to put innocent third parties upon notice of the existence of a judgment lien is an entry of the execution upon a certain record in the office of the clerk of the superior court. When there is a failure to make such record, third parties are not charged with any duty to make an investigation or inquiry in relation to the existence of such a lien against their vendor." *Jackson v. Faver*, 210 Ga. 58, 77 S.E.2d 728 (1953).

**Sureties not discharged.** — When an execution issuing upon a judgment against the principal and several sureties, rendered in the superior court, is not placed upon the general execution docket in accordance with the provisions of this section and several months after the rendition of such judgment the execution is levied upon the property of one of the sureties, the latter surety is not discharged from liability because of the failure of the creditor to have the execution so placed upon the execution docket, thereby permitting to be lost the lien of the judgment on the property of the principal and other sureties by reason of their having disposed of their property subject to such judgment, after the judgment's rendition, to purchasers acting in good faith and without notice of such judgment. *Williams v. Kennedy*, 134 Ga. 339, 67 S.E. 821 (1910).

**Constructive notice of judgment not imputed when judgment not entered on docket.** — Inasmuch as this section appointed a place, to-wit a general execution docket, whereon executions issued upon judgments must be entered in order to affect purchasers from defendants therein with notice of such judgments, the levy of an execution not duly entered on such docket, though followed by a claim and thus giving rise to a pending case, did not charge with constructive

notice of the judgment one who, before the registration of the execution upon the execution docket and without actual notice of the judgment, bought in good faith from a previous vendee of the defendant in execution. *Moody v. Millen*, 103 Ga. 452, 30 S.E. 258 (1898).

**Improper issuance and improper recording of executions** on the general execution docket on the same day judgment was entered does not constitute constructive notice of the existence of a lien against the property to a third-party transferee for value. *Kilgore v. Buice*, 229 Ga. 445, 192 S.E.2d 256 (1972).

**Absolute deed recorded before execution of judgment docketed.** — Conveyance made by absolute deed, whether intended to secure a debt or for full ownership, and whether made before or after the judgment was rendered, are not affected by the judgment if the deed was actually recorded before the execution based on the judgment was entered on the general execution docket, such entry having been delayed until after the ten days' limit had expired. *Bailey v. Bailey*, 93 Ga. 768, 21 S.E. 77 (1894).

**Contest between two judgments.** — Older of two judgments against the same defendant has priority over the younger, as to a fund arising from a sale of the defendant's property, though the execution issued upon the younger may have been duly entered upon the general execution docket, and the execution issued upon the older has never been entered upon that docket at all. *Donovan v. Simmons*, 96 Ga. 340, 22 S.E. 966 (1895); *Griffith v. Posey*, 98 Ga. 475, 25 S.E. 515 (1896).

**Judgments entered on verdicts rendered at same term.** — All judgments entered on verdicts rendered at the same term of court are deemed of equal date. As between liens of judgments rendered at different terms upon property of the defendant, the senior judgment has priority, though the execution issued upon the younger judgment may have been duly entered on the general execution docket as provided for in this section and no execution has been issued upon the older judgment. *Eads v. Southern Sur. Co.*, 178 Ga. 348, 173 S.E. 163 (1934).



**Prerequisite to levying and sale of stock.** — Shares of corporate stock, which were choses in action, cannot be subjected to levy and sale except by compliance with the legal formula prescribed in former Civil Code 1910, § 6035 (see now O.C.G.A. § 9-13-58). *Fourth Nat'l Bank v. Swift & Co.*, 160 Ga. 372, 127 S.E. 729 (1925).

**Sale of crop under execution docketed before mortgage given.** — When a growing crop was mortgaged to secure advances with which to make the crop, and after the crop's maturity was sold under a common law execution against the mortgagor, this execution was entitled to the proceeds of the sale as against an execution issued upon a foreclosure of the mortgage, it appearing that the common law execution had been entered upon the general execution docket before the mortgage was given, and the mortgagee not being a person entitled to a statutory lien upon the crop for such advances. *Stewart v. Kramer*, 99 Ga. 125, 24 S.E. 871 (1896).

**Contest between lien of judgment and bill of sale to secure debt.** — Lien of a judgment duly recorded on the general execution docket is, after the maturity of a growing crop of the defendant in fieri facias, superior to the title thereto obtained through a bill of sale to secure a debt, executed by the defendant in fieri facias to a third person after the judgment is recorded, but before the crop is mature. *Hixon v. Callaway*, 2 Ga. App. 678, 58 S.E. 1120 (1907).

**Extension of time for entry not given upon filing motion for new trial.** — Fact that a motion for a new trial was filed by the defendant in judgment after the period within which this section requires the entry of the execution on the general execution docket did not extend the time prescribed for entry of the execution. *State Bank v. Moore*, 148 Ga. 198, 96 S.E. 225 (1918).

**Money judgment for principal and interest** entered on the general execution docket as to principal only operates as a lien only as to the amount so entered. *Washington Loan & Banking Co. v. Guin*, 236 Ga. 779, 225 S.E.2d 318 (1976).

**Judgment properly entered on execution docket binding from time**

**judgment rendered.** — When a judgment is rendered, if the execution issuing thereon is entered upon the general execution docket in the office of the clerk of the superior court of that county the lien of the judgment upon the property of the defendant is binding from the time the judgment is rendered. *Postell v. Val-Lite Corp.*, 78 Ga. App. 199, 51 S.E.2d 63 (1948).

**Unnecessary for jury verdict to provide for lien.** — It is not necessary that the verdict of a jury shall provide for the establishment of a lien to follow the judgment since the lien follows a money judgment for an amount certain as a matter of law and this applies to a judgment for alimony. *Roberson v. Roberson*, 199 Ga. 627, 34 S.E.2d 836 (1945).

**Designated weekly payments of permanent alimony amount capable of exact determination.** — When the jury provides permanent alimony for the wife in an amount capable of exact determination, a provision in the verdict that it be discharged by designated weekly payments does not prevent the court by the court's decree from providing a lien for the protection of such judgment. *Roberson v. Roberson*, 199 Ga. 627, 34 S.E.2d 836 (1945).

**Creditor did not show that creditor was member of protected class.** — Trial court erred in granting summary judgment for a creditor in a dispute over lien priorities as the creditor did not show that the creditor was a member of the class protected by O.C.G.A. § 9-12-81(b); the creditor had an ownership report prepared before making a loan to an ex-husband and taking the property as security, which did not provide information as to liens, and a search of the county deed records as of the date specified on the ownership report would have put the creditor on notice of an ex-wife's recorded judgment. *Brandenburg v. Navy Fed. Credit Union*, 276 Ga. App. 859, 625 S.E.2d 44 (2005).

**Cited in** *Crosby v. King Hdwe. Co.*, 109 Ga. 452, 34 S.E. 606 (1899); *Dozier v. McWhorter*, 113 Ga. 584, 39 S.E. 106 (1901); *Peagler v. Davis*, 143 Ga. 11, 84 S.E. 59, 1917A Ann. Cas. 232 (1915); *Swift & Co. v. Dowling*, 151 Ga. 449, 107 S.E. 49



(1921); *Burt v. Gooch*, 37 Ga. App. 301, 139 S.E. 912 (1927); *Fountain v. Bryan*, 176 Ga. 31, 166 S.E. 766 (1932); *Northern Fin. Corp. v. Hollingsworth*, 52 Ga. App. 337, 183 S.E. 73 (1935); *Beam v. Rome Hdwe. Co.*, 184 Ga. 272, 191 S.E. 126 (1937); *Tanner v. Wilson*, 184 Ga. 628, 192 S.E. 425 (1937); *Bradley v. Booth*, 62 Ga. App. 770, 9 S.E.2d 861 (1940); *Franklin v. Mobley*, 73 Ga. App. 245, 36 S.E.2d 173 (1945); *Jackson v. Faver*, 210 Ga. 58, 77 S.E.2d 728 (1953); *Lee Rubber & Tire*

*Corp. v. Seaboard Produce Co.*, 106 Ga. App. 708, 128 S.E.2d 73 (1962); *Stephens v. Stephens*, 220 Ga. 22, 136 S.E.2d 726 (1964); *Little River Farms, Inc. v. United States*, 328 F. Supp. 476 (N.D. Ga. 1971); *Watkins v. Citizens & S. Nat'l Bank*, 163 Ga. App. 468, 294 S.E.2d 703 (1982); *Bank S. v. Roswell Jeep Eagle, Inc.*, 200 Ga. App. 489, 408 S.E.2d 503 (1991); *Ragsdale v. Blaw Knox Corp. (In re Hydro-Chem Processing, Inc.)*, 190 Bankr. 129 (Bankr. N.D. Ga. 1995).

### OPINIONS OF THE ATTORNEY GENERAL

**Tax lien is created by the issuance of a tax execution, or writ of fieri facias**, and such lien exists for seven years but not against innocent bona fide purchasers for value while the execution is unrecorded; entry of the execution upon the general execution docket revives the lien for an additional seven-year period and is effective against all subsequent purchasers, dating from such entry or

recording; a nulla bona entry made prior to the expiration of the seven-year period on such execution would revive the lien but only if such entry is also entered or reentered, as the case may be, upon the execution docket or other books upon which executions and entries are required to be entered or reentered. 1969 Op. Att'y Gen. No. 69-114.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 132.

**C.J.S.** — 33 C.J.S., Executions, §§ 79, 90.

**ALR.** — Validity, construction, and application of statute or ordinance requiring

that judgments against municipality be paid in order of their entry or in other particular sequence, 138 ALR 1303.

Mere rendition, or formal entry or docketing, of judgment as prerequisite to issuance of valid execution thereon, 65 ALR2d 1162.

### 9-12-82. When money judgment outside county of defendant's residence creates lien against third parties without notice.

As against bona fide purchasers for value without actual notice of a judgment or other third parties acting in good faith and without notice who have acquired a transfer or lien binding the defendant's property, no money judgment obtained in any court of this state or federal court in this state outside the county of the defendant's residence shall create a lien upon the property of the defendant located in any county other than that where obtained unless the execution issuing thereon is entered upon the general execution docket of the county of the defendant's residence within 30 days from the date of the judgment. When the execution is entered upon the docket after the 30 days, the lien shall date from such entry. (Laws 1822, Cobb's 1851 Digest, p. 497; Ga. L. 1851-52, p. 238, § 1; Code 1863, § 3502; Code 1868, § 3525; Code 1873,



§ 3583; Ga. L. 1878-79, p. 143, § 2; Code 1882, § 3583; Ga. L. 1889, p. 1006, § 3; Civil Code 1895, §§ 2780, 5356; Civil Code 1910, §§ 3322, 5951; Code 1933, §§ 39-702, 110-512.)

### JUDICIAL DECISIONS

**This section has reference to general judgments against the defendant** and all the defendant's property, and not to a judgment in rem. *Whittle v. Tarver*, 75 Ga. 818 (1885).

**Applicability.** — This section applies only when the property of the defendant levied upon is in any county other than where the judgment was obtained. *Reynolds Banking Co. v. I.F. Peebles & Co.*, 142 Ga. 615, 83 S.E. 229 (1914).

This section applies when a suit is brought against joint obligors, joint promisors, copartners, or joint trespassers residing in different counties, and is tried in the county of one of such defendants, and in order for a successful plaintiff in such suit to have a lien upon the personal property of such nonresident joint defendant in any other county than where the judgment was obtained the plaintiff must enter the execution issuing upon such judgment upon the general execution docket of the county of the plaintiff's residence within 30 days from the time the judgment is rendered. *Bradley v. Booth*, 62 Ga. App. 770, 9 S.E.2d 861 (1940).

Former Code 1933, § 39-702 (see now O.C.G.A. § 9-12-82) as qualified by former Code 1933, § 39-703 (see now O.C.G.A. § 9-12-83) referred to judgments obtained in counties of this state outside of the county of the defendant's residence, and provided for entry of an execution on the general execution docket of the county of

the residence of the defendant within 30 days, which if done would cause the lien of the judgment to attach from its date to all personal property of the defendant located in any county in this state. *Bradley v. Booth*, 62 Ga. App. 770, 9 S.E.2d 861 (1940).

**Entry on docket other than when judgment obtained.** — Under this section, entry of an execution on the general execution docket of a county in which land of the defendant is located, other than the county in which the judgment was obtained or the county in which the defendant resided at the commencement of the suit, will convey constructive notice of the judgment and cause the lien of the judgment to affect the land as against a bona fide purchaser for value, without actual knowledge of the judgment, who acquires the land after the execution has been entered on the docket. Relatively to land of the defendant so located, it is not necessary, in order to bind the property as against such purchaser, that the execution be entered on the general execution docket of the county in which the judgment was obtained or the county in which the defendant resided. *Citizens Bank v. Jenkins*, 156 Ga. 874, 120 S.E. 607 (1923).

**Cited in** *Brown v. Caylor*, 144 Ga. 302, 87 S.E. 295, 1916D Ann. Cas. 745 (1915); *Citizens Bank v. Jenkins*, 156 Ga. 874, 120 S.E. 607 (1923); *Boroughs v. Belcher*, 211 Ga. 273, 85 S.E.2d 422 (1955).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 46 Am. Jur. 2d, Judgments, § 351 et seq.

**C.J.S.** — 49 C.J.S., Judgments, § 784.

**ALR.** — Conclusiveness of decree assessing stockholders or policyholders of insolvent corporations or mutual insurance companies, as against nonresidents,

not personally served within state in which decree was rendered, 175 ALR 1419.

Issuance or levy of execution as extending period of judgment lien, 77 ALR2d 1064.



**9-12-83. When money judgment creates lien on land located outside county in which obtained against third parties without notice.**

No money judgment obtained in any court of this state or federal court in this state shall create any lien on land in any county other than that in which it was obtained as against the interests of third parties acting in good faith and without notice who have acquired a transfer or lien binding defendant's property unless at the time of the transfer or the acquisition of the lien the execution was recorded on the general execution docket in the county in which such land is located. (Ga. L. 1914, p. 98, § 2; Code 1933, § 39-703.)

**JUDICIAL DECISIONS**

**Relation to § 9-12-81.** — Former Code 1933, § 39-701 (see now O.C.G.A. § 9-12-81), as qualified by former Code 1933, § 39-703 (see now O.C.G.A. § 9-12-83), contemplated judgments rendered in the county of the residence of the defendant, and the statute's terms were sufficiently broad to leave the lien of the judgment binding from the date of the judgment on all personal property of the defendant in every county of this state. *Bradley v. Booth*, 62 Ga. App. 770, 9 S.E.2d 861 (1940).

**Relation to § 9-12-82.** — Former Code 1933, §§ 39-702 and 110-512 (see now

O.C.G.A. § 9-12-82) as qualified by former Code 1933, § 39-703 (see now O.C.G.A. § 9-12-83) referred to judgments obtained in counties of this state outside of the county of the defendant's residence, and provided for entry of an execution on the general execution docket of the county of the residence of the defendant within 30 days, which if done will cause the lien of the judgment to attach from its date to all personal property of the defendant located in any county in this state. *Bradley v. Booth*, 62 Ga. App. 770, 9 S.E.2d 861 (1940).

**9-12-84. When money judgment against nonresident creates lien on land within state against third parties without notice.**

(a) As against the interests of third parties acting in good faith and without notice who have acquired a transfer or lien binding any real estate situated in this state owned by a nonresident, no money judgment obtained in any court of this state or federal court in this state against the nonresident shall create a lien upon the real estate of the nonresident unless the execution issuing thereon is entered upon the general execution docket of the county in which the real estate is situated. When the execution is entered upon the docket, the lien shall date from such entry.

(b) Nothing in this Code section shall be construed to affect the validity or force of any judgment as between the parties thereto. (Ga. L. 1890-91, p. 207, §§ 1, 2; Civil Code 1895, §§ 2783, 2784; Civil Code 1910, §§ 3325, 3326; Code 1933, §§ 39-706, 39-707.)



## JUDICIAL DECISIONS

**Cited** in Reynolds Banking Co. v. I.F. Peebles & Co., 142 Ga. 615, 83 S.E. 229 (1914).

## RESEARCH REFERENCES

**ALR.** — Mere rendition, or formal entry or docketing, of judgment as prerequisite to issuance of valid execution thereon, 65 ALR2d 1162.

### 9-12-85. Deeds, mortgages, judgments, or liens between parties not affected by money judgments.

Nothing in Code Sections 9-12-81 and 9-12-82 shall be construed to affect the validity or force of any deed, mortgage, judgment, or other lien of any kind as between the parties thereto. (Ga. L. 1889, p. 106, § 4; Civil Code 1895, § 2781; Civil Code 1910, § 3323; Code 1933, § 39-704.)

## JUDICIAL DECISIONS

**As against the rights of third parties acting in good faith**, no judgment lien is binding against the property of a defendant located in the county where the judgment is obtained, unless the judgment is entered in the general execution docket as provided by this article, but nothing as provided by this article shall be construed to affect the validity or force of any deed, or mortgage, or judgment, or other lien of any kind as between the parties thereto. Roberson v. Roberson, 199 Ga. 627, 34 S.E.2d 836 (1945).

**Applicability of O.C.G.A. § 9-12-81(b).** — O.C.G.A. § 9-12-81(b) did not apply to a situation in which the court was asked to rule on the interest of the original parties to a judicial lien and not those of a third party. Natl Serv. Direct, Inc. v. Anderson (In re Nat'l Serv. Direct, Inc.), No. 03-76883, 2005 Bankr.

LEXIS 298 (Bankr. N.D. Ga. Jan. 28, 2005).

**Permanent alimony in amount capable of exact determination.** — When the jury provides permanent alimony for the wife in an amount capable of exact determination, a provision in the verdict that it be discharged by designated weekly payments does not prevent the court by the court's decree from providing a lien for the protection of such judgment. Roberson v. Roberson, 199 Ga. 627, 34 S.E.2d 836 (1945).

**Unnecessary for jury verdict to provide for lien.** — It is not necessary that the verdict of a jury shall provide for the establishment of a lien to follow the judgment since the lien follows a money judgment for an amount certain as a matter of law; this applies to a judgment for alimony. Roberson v. Roberson, 199 Ga. 627, 34 S.E.2d 836 (1945).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, §§ 145, 146.

**C.J.S.** — 33 C.J.S., Executions, §§ 203 et seq., 219.



### 9-12-86. Recordation in county where property located prerequisite to lien on land.

(a) For purposes of this Code section, the term “applicable records” shall include deed books, lis pendens dockets, federal tax lien dockets, general execution dockets, and attachment dockets.

(b) No judgment, decree, or order or any writ of fieri facias issued pursuant to any judgment, decree, or order of any superior court, city court, magistrate court, municipal court, or any federal court shall in any way affect or become a lien upon the title to real property until the judgment, decree, order, or writ of fieri facias is recorded in the office of the clerk of the superior court of the county in which the real property is located and is entered in the indexes to the applicable records in the office of the clerk. Such entries and recordings must be requested and paid for by the plaintiff or the defendant, or his attorney at law.

(c) The recording and indexing required by this Code section shall be in addition to and supplemental to all other recording of judgments, decrees, and orders required by law.

(d) This Code section shall only apply to judgments, decrees, or orders rendered after March 25, 1958. (Ga. L. 1958, p. 379, §§ 1-5; Ga. L. 1966, p. 142, §§ 1-3; Ga. L. 1983, p. 884, § 3-5.)

### JUDICIAL DECISIONS

**Purpose of O.C.G.A. § 9-12-86** is to protect third persons acting in good faith and without notice by requiring that any judgment, decree, or order must be recorded before it will in any way affect or become a lien on title to real property. *National Bank v. Morris-Weathers Co.*, 248 Ga. 798, 286 S.E.2d 17 (1982).

Effect of O.C.G.A. § 9-12-86 is not to repeal either O.C.G.A. § 9-12-87 or O.C.G.A. § 9-12-80. While it is true that § 9-12-86, as amended, provides that all laws or parts of laws in conflict are repealed, there is no conflict which requires a repeal. *National Bank v. Morris-Weathers Co.*, 248 Ga. 798, 286 S.E.2d 17 (1982).

**Section not concerned with perfection of title.** — Language in statute that provides that no judgment shall in any way affect or become a lien upon real property until that judgment is recorded concerns perfection of judgments as liens upon real property, and not perfection of

title. *Richardson v. Park Ave. Bank*, 173 Ga. App. 43, 325 S.E.2d 455 (1984).

**Time from which liens to be dated.** — This section manifests an intention to date liens from the time of recording on the general execution docket. The obvious import is to allow all persons, whether purchasers or creditors, to rely on courthouse records to determine what claims to real property exist. *In re Tinsley*, 421 F. Supp. 1007 (M.D. Ga. 1976), *aff'd*, 554 F.2d 1064 (5th Cir. 1977). But see, *National Bank v. Morris-Weathers Co.*, 248 Ga. 798, 286 S.E.2d 17 (1982).

**Recorded lien relates back to time of judgment.** — Although O.C.G.A. § 9-12-86 causes a judgment to have no effect as a lien on real estate during the period in which the judgment is not recorded, it does not mean that the judgment does not exist. The period between the taking of the judgment and the judgment's recording is merely a period of dormancy. When the judgment is recorded



as provided for, the dormancy ends and the judgment becomes effective as a lien on real estate. For priority purposes, the judgment then relates back to the date of the judgment's rendition and shall be considered of equal date with other perfected liens arising from judgments on verdicts rendered at the same term of court. Otherwise there would be a race to the courthouse by competing judgment creditors. This is the very evil which O.C.G.A. § 9-12-87 was intended to avoid. *National Bank v. Morris-Weathers Co.*, 248 Ga. 798, 286 S.E.2d 17 (1982).

**Recordation prerequisite applicable only to liens on real property.** — Requirement of recordation in this section as a prerequisite to the creation of a lien applies only to liens on real property. In *re Tinsley*, 421 F. Supp. 1007 (M.D. Ga. 1976), *aff'd*, 554 F.2d 1064 (5th Cir. 1977); *National Bank v. Morris-Weathers Co.*, 248 Ga. 798, 286 S.E.2d 17 (1982).

Although a judgment creditor did not have a lien on debtor's real property because the creditor did not record the out-of-state judgment on the general execution docket pursuant to O.C.G.A. § 9-12-86, the creditor did have a lien on the debtor's personal property because the recordation requirement only applied to liens on real property. *Natl Serv. Direct, Inc. v. Anderson (In re Nat'l Serv. Direct, Inc.)*, No. 03-76883, 2005 Bankr. LEXIS 298 (Bankr. N.D. Ga. Jan. 28, 2005).

In a declaratory judgment action brought by the purchasers of certain real property to remove a cloud from the purchaser's title asserted by a bank who had obtained a writ of fieri facias (the lien) against one of the sellers, the trial court erred by granting summary judgment to the bank and holding that the purchasers had a duty to inquire as to prior names used by that seller. The purchasers provided expert testimony that the lien using that seller's married name had not been recorded and, in turn, the bank failed to present any evidence to dispute the affidavits of the purchasers' witnesses or to cite to any authority which imposed a duty on the purchasers or the purchasers' agents to investigate prior or alternative names of that seller when nothing occurred prior to or during the closing that

created a duty to inquire and that the seller had falsely sworn under oath that the property was not subject to any encumbrances or liens and that there were no outstanding judgments. *Gallagher v. Buckhead Cmty. Bank*, 299 Ga. App. 622, 683 S.E.2d 50 (2009), cert. denied, No. S09C2080, 2010 Ga. LEXIS 2 (Ga. 2010).

**As to personal property, former Code 1933, §§ 110-506 and 110-507 (see now O.C.G.A. §§ 9-12-80 and 9-12-89) applied** to establish the date of a trial court judgment as the date on which the creditors obtain a lien. In *re Tinsley*, 421 F. Supp. 1007 (M.D. Ga. 1976), *aff'd*, 554 F.2d 1064 (5th Cir. 1977).

**Georgia law determines when transfer takes place for Bankruptcy Code, 11 U.S.C. § 547(e)(1), purposes;** and a transfer for preference avoidance purposes does not occur until the lien is recorded on the general execution docket pursuant to O.C.G.A. § 9-12-86. *Wall v. Asics Tiger Corp.*, 216 Bankr. 1016 (Bankr. M.D. Ga. 1998).

Under O.C.G.A. § 9-12-86, a creditor's judgment lien against a debtor's real property was not perfected for purposes of 11 U.S.C. § 547(b) until the lien was recorded, and because the lien was recorded within 90 days of the filing of the debtor's bankruptcy petition, a trustee was permitted to avoid the transfer of the security interest as a preference; the court declined to use the court's equitable powers under 11 U.S.C. § 105(a) to find that the transfer occurred outside the preference period because to do so would have circumvented the trustee's clear statutory authority to avoid preference transactions. *Pettigrew v. Hoey Constr. Co. (In re NotJust Another CarWash, Inc.)*, No. 04-90859-MGD, 2007 Bankr. LEXIS 979 (Bankr. N.D. Ga. Feb. 15, 2007).

In determining that a debtor's transfer of a security interest in certain real property to a judgment creditor occurred for purposes of 11 U.S.C. § 547(b) when the creditor's judgment lien was recorded, the court applied O.C.G.A. § 9-12-86 because: (1) case law holding that an unrecorded deed had priority over a recorded judgment lien was limited to O.C.G.A. § 44-2-2 and did not prevent the application of § 9-12-86 in the instant case; (2)



§ 9-12-86 provided an exception to O.C.G.A. § 9-12-80's general rule that a creditor acquired a lien when judgment was entered; and (3) a trustee's imputed knowledge of a transfer was not relevant for purposes of 11 U.S.C. § 547. *Pettigrew v. Hoey Constr. Co. (In re NotJust Another CarWash, Inc.)*, No. 04-90859-MGD, 2007 Bankr. LEXIS 979 (Bankr. N.D. Ga. Feb. 15, 2007).

**Recordation of in-state federal judgment in county is all that is required to establish lien.** — To establish a lien on real property, a judgment creditor must file the writ of fieri facias on the general execution docket of the county in which the property is located. Thus, given the requirement that intrastate federal court judgments must receive the same treatment as state court judgments, all that a holder of an in-state federal judg-

ment must do to establish a lien on real property is record a federal writ of execution on the general execution docket of the respective county. *Tunnelite, Inc. v. Estate of Sims*, 266 Ga. App. 476, 597 S.E.2d 555 (2004).

**Cited** in *Dunlap Hdwe. Co. v. Tharp*, 2 Ga. App. 63, 58 S.E. 398 (1907); *Stephens v. Stephens*, 220 Ga. 22, 136 S.E.2d 726 (1964); *City of Rome v. Pilgrim*, 246 Ga. 281, 271 S.E.2d 189 (1980); *Southern Educators Assocs. v. Silver*, 245 Ga. 520, 284 S.E.2d 3 (1981); *Landmark First Nat'l Bank v. Schwall & Heuett*, 161 Ga. App. 356, 288 S.E.2d 331 (1982); *Watkins v. Citizens & S. Nat'l Bank*, 163 Ga. App. 468, 294 S.E.2d 703 (1982); *Eavenson v. Parker*, 261 Ga. 607, 409 S.E.2d 520 (1991); *Baggett v. Baggett*, 270 Ga. App. 619, 608 S.E.2d 688 (2004).

## OPINIONS OF THE ATTORNEY GENERAL

**Any and all judgments, orders, decrees, or writs of fieri facias must be recorded** and not merely one of them, and they must be recorded in as many of

the appropriate records of the clerk's office as included within the definition of "applicable records." 1967 Op. Att'y Gen. No. 67-222.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 46 Am. Jur. 2d, Judgments, §§ 349, 352.

**Am. Jur. Pleading and Practice Forms.** — 15 Am. Jur. Pleading and Practice Forms, Judgments, § 18.

**C.J.S.** — 49 C.J.S., Judgments, § 772 et seq.

**ALR.** — Judgment as lien on unrecorded title to real estate, 43 ALR 44.

Decree on bill of review reversing prior decree as affecting purchaser or mortgagee of real property in the interval between the original decree and the filing of the bill of review, 150 ALR 676.

## 9-12-87. Judgments from same term considered of equal date.

(a) All judgments signed on verdicts rendered at the same term of court shall be considered, held, and taken to be of equal date.

(b) In the case of judgments signed on verdicts rendered at the same term of the court, no execution shall be entitled to any preference by reason of being first placed in the hands of the levying officer. (Laws 1822, Cobb's 1851 Digest, p. 497; Code 1863, § 3497; Code 1868, § 3520; Code 1873, § 3578; Code 1882, § 3578; Civil Code 1895, § 5349; Civil Code 1910, § 5944; Code 1933, §§ 39-112, 110-505.)



**Law reviews.** — For note discussing procedures required to effect a levy of execution, see 12 Ga. L. Rev. 814 (1978).

### JUDICIAL DECISIONS

**Effect of O.C.G.A. § 9-12-86 is not to repeal O.C.G.A. § 9-12-87 or O.C.G.A. § 9-12-80.** While it is true that § 9-12-86 as amended provides that all laws or parts of laws in conflict are repealed, there is no conflict which requires a repeal. *National Bank v. Morris-Weathers Co.*, 248 Ga. 798, 286 S.E.2d 17 (1982).

**Verdict is the response of the jury to the charge** and to the issue formed upon it. *Lawson v. State*, 52 Ga. App. 181, 182 S.E. 820 (1935).

**In every verdict there must be a reference to the indictment and the issue** to make it have any meaning. *Lawson v. State*, 52 Ga. App. 181, 182 S.E. 820 (1935).

**All judgments entered on verdicts rendered at the same term of court were deemed of equal date** and, as between liens of judgments rendered at different terms upon property of the defendant, the senior judgment had priority, though the execution issued upon the younger judgment may have been duly entered on the general execution docket as provided for in former Code 1933, § 39-701 (see now O.C.G.A. § 9-12-81) and no execution had been issued upon the older judgment. *Eads v. Southern Sur. Co.*, 178 Ga. 348, 173 S.E. 163 (1934); *Fas-Pac, Inc. v. Fillingame*, 123 Ga. App. 203, 180 S.E.2d 243 (1971); *Wellington v. Lenkerd Co.*, 157 Ga. App. 755, 278 S.E.2d 458 (1981).

**Application of federal and state law in determining priority of liens.** — In determining the priority of liens, the fed-

eral bankruptcy court applied federal law to determine that the Internal Revenue Service claim had priority over two liens not determined or recorded prior to the recordation of the notice of the IRS tax lien with the result that these creditors received none of the funds to which the IRS was entitled; then the court applied state law by creating a fund equal to the amount of the claim of two other creditors which were superior to the IRS tax lien and distributed the fund pro rata among the four creditors since the four judgments were rendered during the same term of court and were thus of equal date and priority. *Ragsdale v. Blaw Knox Corp. (In re Hydro-Chem Processing, Inc.)*, 190 Bankr. 129 (Bankr. N.D. Ga. 1995).

**Priority of judicial lien in bankruptcy.** — Creditor's preexisting judicial lien on bankrupt debtor's personal property had priority over the debtor's hypothetical lien because the creditor's lien attached when the lien was registered in federal court in the state, which was well before the debtor's hypothetical lien was created as of the date of the bankruptcy petition. *Natl Serv. Direct, Inc. v. Anderson (In re Nat'l Serv. Direct, Inc.)*, No. 03-76883, 2005 Bankr. LEXIS 298 (Bankr. N.D. Ga. Jan. 28, 2005).

**Cited in** *Kirsch v. Witt*, 37 Ga. App. 402, 140 S.E. 511 (1927); *Herndon v. Braddy*, 39 Ga. App. 165, 146 S.E. 495 (1929); *Lawson v. State*, 52 Ga. App. 181, 182 S.E. 820 (1935); *White v. Georgia Farm Bureau Mut. Ins. Co.*, 234 Ga. 186, 215 S.E.2d 240 (1975).

### RESEARCH REFERENCES

**C.J.S.** — 49 C.J.S., Judgments, § 797 et seq.

**ALR.** — Priority of judgment over conveyance made after beginning of term but prior to rendition of judgment, 5 ALR 1072.

Priority as between judgments of differ-

ent dates as regards lien on subsequently acquired property, 67 ALR 1301.

Validity, construction, and application of statute or ordinance requiring that judgments against municipality be paid in order of their entry or in other particular sequence, 138 ALR 1303.



**9-12-88. Extent property affected by judgment pending appeal.**

In all cases in which a judgment is rendered and an appeal is entered from the judgment, the property of the defendant in judgment shall not be bound by the judgment except so far as to prevent the alienation by the defendant of his property between its signing and the signing of the judgment on the appeal, but the property shall be bound from the signing of the judgment on the appeal. (Laws 1812, Cobb's 1851 Digest, p. 496; Code 1863, § 3500; Code 1868, § 3523; Code 1873, § 3581; Code 1882, § 3581; Civil Code 1895, § 5352; Civil Code 1910, § 5947; Code 1933, § 110-508.)

**JUDICIAL DECISIONS**

**Lien judgment binding from date of original rendition.** — When on an appeal from a judgment in a justice of the peace court the appellee is successful, the lien of judgment will be taken as binding from the date of the judgment's original rendition, and entitled to superiority over a subsequently rendered judgment, notwithstanding the provisions of this section. *Tilley v. King*, 193 Ga. 602, 19 S.E.2d 281 (1942), later appeal, 69 Ga. App. 561, 26 S.E.2d 293 (1943).

**Liability for frivolous appeals.** — Property alienated pending an appeal is as much bound for the payment of the damages for a frivolous appeal as it is for the payment of the rest of the amount of the appeal judgment. *Phillips v. Behn & Foster*, 19 Ga. 298 (1856).

**Mortgage is alienation.** — Mortgage executed by a defendant against whom a verdict has been rendered, upon which an

appeal has been taken, is an alienation, within the sense of this section. *Behn & Foster v. Phillips*, 18 Ga. 466 (1855).

**Effect of evidence not showing possession or title.** — If there is no evidence that the defendant was in possession of property before or after the judgment was rendered against the defendant, and no title was shown in the defendant, the fact that the defendant conveyed the property by deed subsequent to that judgment, and possession was taken thereunder by the vendee, does not render the property liable thereto. *Wimberly v. Collier*, 50 Ga. 144 (1873).

**Cited in** *Watkins v. Angier*, 99 Ga. 519, 27 S.E. 718 (1896); *Dodd & Co. v. Glover*, 102 Ga. 82, 29 S.E. 158 (1897); *Mulherin v. Kennedy*, 120 Ga. 1080, 48 S.E. 437 (1904); *Landmark First Nat'l Bank v. Schwall & Heuett*, 161 Ga. App. 356, 288 S.E.2d 331 (1982).

**RESEARCH REFERENCES**

**C.J.S.** — 49 C.J.S., Judgments, § 781 et seq.

**ALR.** — Appeal as affecting time allowed by judgment or order appealed from for the performance of a condition affect-

ing a substantive right or obligation, 28 ALR 1029.

Validity of mortgage executed by entryman on public land before patent, 41 ALR 938.

**9-12-89. Effect of appellate proceeding on lien.**

A judgment in the trial court which is taken to the Supreme Court or the Court of Appeals and is affirmed loses no lien or priority by the proceeding in the appellate court. (Orig. Code 1863, § 3498; Code 1868,



§ 3521; Code 1873, § 3579; Code 1882, § 3579; Civil Code 1895, § 5350; Civil Code 1910, § 5945; Code 1933, § 110-506.)

### JUDICIAL DECISIONS

**Meaning of section.** — This section provides that a judgment is suspended upon the entering of an appeal, but such suspension is not to affect the creditor's rights. *In re Tinsley*, 421 F. Supp. 1007 (M.D. Ga. 1976), *aff'd*, 554 F.2d 1064 (5th Cir. 1977).

**Date of trial court judgment.** — As to personal property, former Code 1933, §§ 110-506 and 110-507 (see now O.C.G.A. §§ 9-12-80 and 9-12-89) applied

to establish the date of a trial court judgment as the date on which the creditors obtained a lien. *In re Tinsley*, 421 F. Supp. 1007 (M.D. Ga. 1976), *aff'd*, 554 F.2d 1064 (5th Cir. 1977).

**Cited** in *Tilley v. King*, 193 Ga. 602, 19 S.E.2d 281 (1942); *Landmark First Nat'l Bank v. Schwall & Heuett*, 161 Ga. App. 356, 288 S.E.2d 331 (1982); *Nelson v. Smothers*, 168 Ga. App. 120, 308 S.E.2d 239 (1983).

### RESEARCH REFERENCES

**C.J.S.** — 49 C.J.S., Judgments, § 797 et seq.

**ALR.** — Validity, construction, and application of statute or ordinance requiring that judgments against municipality be

paid in order of their entry or in other particular sequence, 138 ALR 1303.

Issuance or levy of execution as extending period of judgment lien, 77 ALR2d 1064.

## 9-12-90. Judgments relating to common disaster.

(a) Liens of all judgments obtained in actions for damages growing out of a common disaster or occurrence shall be equal in rank or priority regardless of the date of the rendition of the verdict or the entering of the judgment. However, this Code section shall apply only to judgments obtained in actions which are filed within 12 months from the date of the happening of the disaster or occurrence giving rise to the cause of action.

(b) This Code section applies to all actions filed in the courts of this state in which damages are sought to be recovered on account of injuries sustained in or death resulting from a common disaster or occurrence. (Ga. L. 1947, p. 1138, §§ 1, 2.)

### JUDICIAL DECISIONS

**Inapplicability of section.** — O.C.G.A. § 9-12-90 did not apply to a case which did not involve the priority of judgment liens. *Allstate Ins. Co. v. Evans*, 200 Ga. App. 713, 409 S.E.2d 273, cert. denied, 200 Ga. App. 895, 409 S.E.2d 273 (1991).

**Cited** in *Cannon v. Tant*, 229 Ga. 771, 195 S.E.2d 15 (1972); *White v. Georgia Farm Bureau Mut. Ins. Co.*, 234 Ga. 186, 215 S.E.2d 240 (1975).



## RESEARCH REFERENCES

**C.J.S.** — 49 C.J.S., Judgments, § 797 et seq.

**ALR.** — Priority as between decree for alimony and claims of other creditors, 66 ALR 1473.

Judgment against tortfeasor's insurer in action by injured person as res judicata

in similar action by another person injured in same accident, 121 ALR 890.

Validity, construction, and application of statute or ordinance requiring that judgments against municipality be paid in order of their entry or in other particular sequence, 138 ALR 1303.

## 9-12-91. Effect of judgment on promissory notes.

A judgment creates no lien upon promissory notes in the hands of the defendant. (Orig. Code 1863, § 3501; Code 1868, § 3524; Code 1873, § 3582; Code 1882, § 3582; Civil Code 1895, § 5353; Code 1910, § 5948; Code 1933, § 110-509.)

## JUDICIAL DECISIONS

**Judgment creates no lien on choses in action belonging to defendant.** *Anderson v. Ashford & Co.*, 174 Ga. 660, 163 S.E. 741 (1932).

Judgment does not bind a chose in action and the judgment would constitute no lien upon money in the possession of the defendant, or upon wages in the possession of a nonresident. *Southland Loan & Inv. Co. v. Anderson*, 178 Ga. 587, 173 S.E. 688 (1934).

**Judgment created by garnishment.** — Lien obtained by service of summons of garnishment issued on an existing judgment is created by the garnishment, and not by the judgment. *Armour Packing Co. v. Wynn*, 119 Ga. 683, 46 S.E. 865 (1904).

**Homestead exemption for partners.** — Right of a partner to a homestead exemption out of the property of the partner's firm is a chose in action; and the assignment of such chose in action by the partner, before the institution of a collateral proceeding or a garnishment, passes to the assignee the property in the chose in action assigned, free from the lien of a general judgment previously rendered against the assignor. *Citizens Bank & Trust Co. v. Pendergrass Banking Co.*, 164 Ga. 302, 138 S.E. 223 (1927).

**Stock in corporation is chose in action** so in the absence of a statute the stock would not be subject to levy or sale. *Owens v. Atlanta Trust & Banking Co.*, 122 Ga. 521, 50 S.E. 379 (1905).

**Lien of a judgment against one holding stock is inferior to an existing lien** arising by virtue of a by-law, even though the plaintiff in a writ of fieri facias had no notice thereof at the time the plaintiff made the loan, secured the judgment, or gave notice to the corporation. *Owens v. Atlanta Trust & Banking Co.*, 122 Ga. 521, 50 S.E. 379 (1905).

**Assignment of chose in action by debtor** before institution of collateral proceeding or garnishment passes to the assignee the property of the debtor in the chose in action assigned, freed from the lien of a general judgment previously rendered against the assignor. *Fidelity & Deposit Co. v. Exchange Bank*, 100 Ga. 619, 28 S.E. 393 (1897).

**Claim of the assignee of a judgment is subject to** such equities and defenses as may have existed in favor of the judgment debtor against the judgment creditor at the time of the assignment, but is not subject to rights which did not then exist in favor of such judgment debtor and of which the judgment debtor did not become possessed until some time later as by the subsequent purchase of judgments against the judgment creditor. Accordingly, a judgment which is held by an assignee is not subject to a set-off in favor of judgments existing against the assignor, but not acquired by the judgment debtor until after the assignment of the



former judgment. *Sheffield v. Preacher*, 175 Ga. 719, 165 S.E. 742 (1932).

Ga. 1870) (No. 4,524); *Kilgore v. Buice*, 229 Ga. 445, 192 S.E.2d 256 (1972).

**Cited in** *In re Erwin*, 8 F. Cas. 779 (S.D.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 46 Am. Jur. 2d, Judgments, § 354.

**C.J.S.** — 49 C.J.S., Judgments, §§ 764, 766, 781, 782, 831.

### 9-12-92. Effect of judgment lien on personalty removed to another state, sold, and returned.

When a judgment lien has attached to personal property which is removed to another state and sold, the property shall be subject to the judgment lien if brought back to this state. (Orig. Code 1863, § 3503; Code 1868, § 3526; Code 1873, § 3584; Code 1882, § 3584; Civil Code 1895, § 5357; Civil Code 1910, § 5952; Code 1933, § 110-513.)

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 46 Am. Jur. 2d, Judgments, §§ 353, 355.

**C.J.S.** — 49 C.J.S., Judgments, § 781 et seq.

### 9-12-93. When purchased property discharged from lien.

When any person has bona fide and for a valuable consideration purchased real or personal property and has been in the possession of the real property for four years or of the personal property for two years, such property shall be discharged from the lien of any judgment against the person from whom it was purchased or against any predecessor in title of real or personal property. Nothing contained herein shall be construed to otherwise affect the validity or enforceability of such judgment, except to discharge such property from any such lien of judgment. (Laws 1822, Cobb's 1851 Digest, p. 497; Ga. L. 1851-52, p. 238, § 1; Code 1863, § 3502; Code 1868, § 3525; Code 1873, § 3583; Code 1882, § 3583; Civil Code 1895, § 5355; Civil Code 1910, § 5950; Code 1933, § 110-511; Ga. L. 1994, p. 310, § 1.)

**Law reviews.** — For note on the 1994 amendment of this Code section, see 11 Ga. St. U.L. Rev. 62 (1994).

### JUDICIAL DECISIONS

**Section not retroactive.** — Act of 1852 from whence this section came, by its phraseology and plain terms, was not intended to have retrospective application to judgments rendered before the statute's

passage. *Lockhart & Threewits v. Tinley*, 15 Ga. 496 (1854).

**Section not statute of limitation.** — This section is not classed with, and does not fall under the classification of a stat-



ute of limitation. *Chapman v. Akin*, 39 Ga. 347 (1869).

**Refers to general judgments, not judgments in rem.** — This section has reference to general judgments against the defendant and all the defendant's property, and not to a judgment in rem. *Whittle v. Tarver*, 75 Ga. 818 (1885).

**This section applies whenever there is no obstacle to prevent a levy.** *Carnes v. American Agric. Chem. Co.*, 158 Ga. 188, 123 S.E. 18 (1924).

**This section applies though the land had been levied on before the purchase,** no steps having been taken by the judgment creditor to enforce the levy until after four years' possession by the purchaser. *Braswell v. Plummer*, 56 Ga. 594 (1876).

**When there is a legal impediment to levying,** the judgment creditor is not guilty of laches in waiting for the impediment's removal before taking action nor subject to the four years possession of land rule which will divest the lien of a judgment. *Cohutta Mills, Inc. v. Hawthorne Indus., Inc.*, 179 Ga. App. 815, 348 S.E.2d 91 (1986).

**Judgment of foreclosure of a mortgage** is not a judgment against the thing or property mortgaged, and not being a judgment against the person from whom the claimant purchased the land, it is not within this section. *Hays v. Reynolds*, 53 Ga. 328 (1874); *Redding v. Anderson*, 144 Ga. 100, 86 S.E. 241 (1915).

**This section is not applicable when a claimant bought property from a third person** and had possession for more than two years before the levy of a mortgage execution. *Griffin v. Colonial Bank*, 7 Ga. App. 126, 66 S.E. 382 (1909).

**This section does not apply to a claim based on a partitioning proceeding.** *Barron v. Lovett*, 207 Ga. 131, 60 S.E.2d 458 (1950).

**Judgment constitutes no lien when registration not made.** — When the execution had not been recorded as required by former Civil Code 1895, § 2779 (see now O.C.G.A. § 9-12-81), and a transfer of the property was thereafter made to an innocent purchaser without notice of the existence of the judgment and before the actual record of the execution, the

judgment never did constitute a lien as against the purchaser upon the particular thus disposed of by the defendant in a writ of fieri facias. Hence, former Civil Code 1895, § 3525 (see now O.C.G.A. § 9-12-93) could have no application to such a case, but referred to cases where the lien of the judgment once existed upon the land after the purchase or possession thereof by a bona fide purchaser, and by lapse of time the property had become discharged from the lien of such judgment. *Harvey & Brown v. Sanders*, 107 Ga. 740, 33 S.E. 713 (1899).

**Supreme Court cannot decide whether lien lost.** — Questions as to loss of lien under this section not made in the record can not be considered by the Supreme Court, although argued and insisted on in the Supreme Court. *Denny v. Broadway Nat'l Bank*, 118 Ga. 221, 44 S.E. 982 (1903).

**Protection not dependent upon purchaser having paper title.** — Protection afforded by this section does not depend upon the purchaser's having a paper title, but upon the bona fide of the purchase, the payment of a valuable consideration, and possession for four years after judgment. *Trice v. Rose*, 80 Ga. 408, 7 S.E. 109 (1888); *Hardin v. Reynolds*, 189 Ga. 589, 6 S.E.2d 913 (1940).

**Purchaser in good faith and for valuable consideration** shall be relieved of the lien of any judgment against the seller after the purchaser has been in possession, in the case of real property, for a period of four years. *Calhoun v. Williamson*, 193 Ga. 314, 18 S.E.2d 479 (1942); *Barron v. Lovett*, 207 Ga. 131, 60 S.E.2d 458 (1950).

Trial court erred in entering summary judgment on an administrator's individual claim as a judgment creditor of the decedent since fact issues remained as to whether O.C.G.A. § 9-12-93 applied, including issues as to the elements of good faith and valuable consideration. *Huggins v. Powell*, 315 Ga. App. 599, 726 S.E.2d 730 (2012).

**Burden of proof.** — Proving the three requirements places the burden of proof upon the purchaser to prove good faith, but it does not encumber the purchaser with the further burden of making this



proof while bearing a badge of fraud solely because the purchaser purchased with knowledge of the existence of the lien. *Hardin v. Reynolds*, 189 Ga. 589, 6 S.E.2d 913 (1940).

**If one purchased before a judgment against one's vendor has been obtained**, during which time no attempt is made by the judgment creditor to enforce execution against the land, such purchaser will be protected, under this section, although the purchaser took no deed at the time of the purchase, nor had obtained a deed up to the time of the levy of the execution. *Trice v. Rose*, 80 Ga. 408, 7 S.E. 109 (1888).

**Effect of levy without notice on claimant's right.** — Claimant's right to be protected as a bona fide purchaser against the lien of the plaintiff's judgment, on account of the claimant's four years' possession of the property, cannot be defeated by a levy without the notice which the law requires to be given. *William P. Anderson & Co. v. Cheney*, 51 Ga. 372 (1874).

**Validity of lien against property held by bona fide purchaser.** — Lien of the plaintiff's judgment is just as valid against the property in the hands of a bona fide purchaser, until protected by this section, as in the hands of the defendant in execution. *Barden v. Grady*, 37 Ga. 660 (1868).

**Knowledge of the existence of a judgment against the seller** does not constitute prima facie evidence of bad faith on the part of the purchaser, but such knowledge is a circumstance which the jury should consider along with other evidence bearing on the question of good faith. *Reynolds v. Hardin*, 187 Ga. 40, 200 S.E. 119 (1938), later appeal, 189 Ga. 589, 6 S.E.2d 913 (1940).

**Court charges to jury erroneous on bona fides of purchase.** — When a claim to land is based upon the provisions of this section, and one of the issues in the case is whether the claimant purchased bona fide, charges of the court so stated as to lead the jury to believe that the judgment lien has been divested if the vendor acted bona fide and for a valuable consideration, regardless of the bona fides of the purchaser (claimant), are erroneous and

confusing to the jury. *Calhoun v. Williamson*, 193 Ga. 314, 18 S.E.2d 479 (1942).

**Partner to whom copartners conveyed assets to pay firm debts is a quasi trustee** for the copartners and accountable to them, and is not such a bona fide purchaser for value of the realty who will be protected under this section when there is no evidence of accounting to eliminate the trust aspect of the conveyance. *Westbrook v. Hays*, 89 Ga. 101, 14 S.E. 879 (1892).

**Evidence for jury's consideration.** — That the grantor remained in possession as tenant of the grantee as to the interest conveyed is a circumstance for the consideration of the jury in determining the bona fides of the transaction, but will not per se prevent it from falling within this section. *Johnson v. Oliver*, 138 Ga. 347, 75 S.E. 245 (1912).

**Testimony of vendee of good faith purchase competent.** — Under this section, it is competent for the immediate vendee of the defendant in execution to testify affirmatively that the vendee bought and entered in good faith and without any intent to hinder, delay, or defraud creditors of the defendant. *Hale v. Robertson & Co.*, 100 Ga. 168, 27 S.E. 937 (1897).

**Effect of bona fide debtor making conveyance to creditor.** — If a debtor bona fide conveys land to the debtor's creditor in payment and discharge of an existing debt, this constitutes such a valuable consideration as falls within the provision of this section. *Johnson v. Oliver*, 138 Ga. 347, 75 S.E. 245 (1912); *Calhoun v. Williamson*, 193 Ga. 314, 18 S.E.2d 479 (1942).

**Four years' possession of land which will divest a lien of a judgment must** be during a period of that length of time when the judgment could be lawfully enforced against the land. *Dozier v. McWhorter*, 113 Ga. 584, 39 S.E. 106 (1901); *Carnes v. American Agric. Chem. Co.*, 158 Ga. 188, 123 S.E. 18 (1924).

**Possession requirement not satisfied by defendant's possession of land.** — Question on four years' possession of realty under title from the defendant in fieri facias, discharging the property from the lien of judgments, does not



turn upon the nature of the defendant's title, but the bona fides of the purchaser; therefore, the fact that the defendant had taken homestead in the land before the sale was properly ruled out. *Taylor v. Morgan*, 61 Ga. 46 (1878).

**Nature of the "possession."** — "Possession must be open and notorious, in good faith and exclusion (exclusive)." *Taylor v. Morgan*, 61 Ga. 46 (1878); *Cox v. Prater*, 67 Ga. 588 (1881); *Page v. Jones*, 186 Ga. 485, 198 S.E. 63 (1938).

Possession does not necessarily involve an actual personal residence upon the premises, but such occupancy by visible signs of dominion as will serve to put persons interested upon notice of the adverse claim. *Hale v. Robertson & Co.*, 100 Ga. 168, 27 S.E. 937 (1897); *Page v. Jones*, 186 Ga. 485, 198 S.E. 63 (1938).

**Possession must be actual.** *Phinizy & Clayton v. Porter*, 70 Ga. 713 (1883); *Page v. Jones*, 186 Ga. 485, 198 S.E. 63 (1938).

**Registration insufficient.** — Registration of the deed made to the purchaser will not do in place of actual possession. *Carmichael v. Strawn*, 27 Ga. 341 (1859).

**Allowing defendant to show adverse possession of predecessor.** — There was no error in allowing the defendant to prove that the defendant's predecessor in title took possession without difficulty under the deed made to it, and exercised acts of ownership without protest from any source, and expended large sums of money on the faith of the title. *Rosser v. Georgia Pac. Ry.*, 102 Ga. 164, 29 S.E. 171 (1897).

**Effect of homestead on land.** — Several times it has been decided that the existence of a homestead on land would be sufficient to relieve a plaintiff in *feri facias* from the operation of this section. *Carnes v. American Agric. Chem. Co.*, 158 Ga. 188, 123 S.E. 18 (1924).

**Tacking of homesteads not permitted.** — Possession under an order setting apart a homestead to the wife of the defendant in execution cannot be tacked

to subsequent possessions to protect the purchaser under this section from the seizure of the homestead under an execution based on a debt contracted prior to the adoption of the Ga. Const. of 1868. *Smith v. Ezell*, 51 Ga. 570 (1874).

**Defendant in fieri facias may remain in possession as a tenant of the purchaser** and such fact will not per se prevent the possession from being that required by this section, but is a circumstance for the consideration of the jury in determining the bona fides of the transaction or the possession. *Page v. Jones*, 186 Ga. 485, 198 S.E. 63 (1938).

**Easements in lots conveyed with fee to other lots.** — Possession of a grantee for four years in easements in certain lots conveyed with fee to other lots, does not discharge fee in former lots from judgment against the grantor. *Moses v. Eagle & Phenix Mfg. Co.*, 62 Ga. 455 (1879).

**Pledgee of personal property**, who acquires possession of the property in good faith and without actual notice of a judgment against the pledgor, is a "purchaser" within the meaning of this section. *Hardeman v. Etheridge* (In re Johnson), 112 F. 619 (5th Cir. 1901).

**Vendee of obligee of bond for titles not protected.** — When the obligee in a bond for the title sells land after judgment against the obligee for part of purchase money, the obligee's vendee is not protected by possession prescribed by this section. *Janes v. Patterson*, 62 Ga. 527 (1879).

**Cited in** *Sanders v. McAfee*, 42 Ga. 250 (1871); *Rucker v. Womack*, 55 Ga. 399 (1875); *Broughton v. Foster*, 69 Ga. 712 (1882); *Danielly v. Colbert*, 71 Ga. 218 (1883); *Shuder v. Barlett*, 72 Ga. 463 (1884); *Rodgers v. Elder*, 108 Ga. 22, 33 S.E. 662 (1899); *Moate v. Rives*, 146 Ga. 425, 91 S.E. 420 (1917); *Boyd v. Clark*, 44 Ga. App. 645, 162 S.E. 656 (1932); *Calhoun v. Williamson*, 189 Ga. 65, 5 S.E.2d 41 (1939); *Calhoun v. Williamson*, 201 Ga. 759, 41 S.E.2d 146 (1947).

## OPINIONS OF THE ATTORNEY GENERAL

**Discharge provisions applicable to tax liens.** — When real property is pur-

chased by a bona fide purchaser for valuable consideration who then retains pos-



session of the real property for four years, the property is discharged from the lien of any tax execution arising from the failure of the seller to pay ad valorem property taxes on the property. 1980 Op. Att'y Gen. No. 80-59.

**Four-year period applicable to tax liens.** — This four-year period operating to discharge the property from the lien of any judgment against the seller applies to the lien of any tax execution against the seller. 1980 Op. Att'y Gen. No. 80-59.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 46 Am. Jur. 2d, Judgments, §§ 379, 380, 384.

**C.J.S.** — 49 C.J.S., Judgments, § 823 et seq.

### 9-12-94. Clerk's fees.

For entering an execution upon the general execution docket, the clerk shall be entitled to the fees enumerated in Code Section 15-6-77. (Ga. L. 1889, p. 106, § 5; Civil Code 1895, § 2782; Civil Code 1910, § 3324; Code 1933, § 39-705; Ga. L. 1950, p. 107, § 1; Ga. L. 1971, p. 699, § 3.)

### JUDICIAL DECISIONS

**Cited** in Benton v. Benton, 164 Ga. 541, 139 S.E. 68 (1927).

### OPINIONS OF THE ATTORNEY GENERAL

**Duty of clerk to collect indexing fee.** — Clerk who was on a salary basis must collect the indexing fee prescribed by former Code 1933, § 39-705 (see now O.C.G.A. § 9-12-94); any failure to collect such fee and make proper disposition of

the money could subject the clerk to a fine under former Code 1933, § 24-2721 (see now O.C.G.A. § 15-6-81) (failure to perform duty punishable as contempt). 1970 Op. Att'y Gen. No. U70-171.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 15A Am. Jur. 2d, Clerks of Court, § 11 et seq.

**C.J.S.** — 21 C.J.S., Courts, § 333 et seq.

## ARTICLE 5

### UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT

**Cross references.** — Time limitation on bringing of actions upon judgments obtained outside state, § 9-3-20.



## JUDICIAL DECISIONS

**Statute does not apply to the judgments of other states** of the United States. *Trammell v. Burke, Inc.*, 154 Ga. App. 366, 268 S.E.2d 417 (1980).

**Payment is a complete defense** to enforcement of a foreign judgment entitled to full faith and credit and domesti-

cation in this state and the defendant may plead partial satisfaction or any other affirmative defense to the enforcement sought in an action on the domesticable judgment. *Sun First Nat'l Bank v. Gainesville 75, Ltd.*, 155 Ga. App. 70, 270 S.E.2d 293 (1980).

## RESEARCH REFERENCES

**C.J.S.** — 50 C.J.S., Judgments, § 1273 et seq.

**ALR.** — Foreign judgment based upon or which fails to give effect to a judgment previously rendered at the forum or in a third jurisdiction, 44 ALR 457; 53 ALR 1146.

Conclusiveness as to merits of judgment of courts of foreign country, 46 ALR 439; 148 ALR 991.

Injunction against enforcement of judgment rendered in foreign country or other state, 64 ALR 1136.

Interlocutory judgment or decree in one state as bar to an action in another state, 84 ALR 721.

Recognition and enforcement, upon principles of comity, of decree or part of decree for alimony, rendered in another state, which is not within full faith and credit provision, 132 ALR 1272.

Foreign attachment or garnishment as available in action by nonresident against nonresident or foreign corporation upon a foreign cause of action, 14 ALR2d 420.

Identification of parties in action on foreign judgment, 60 ALR2d 1024.

Uniform Enforcement of Foreign Judgments Act, 72 ALR2d 1255.

Construction and application of Uniform Foreign Money Judgments Recognition Act, 100 ALR3d 792.

## 9-12-110. Short title.

This article shall be known and may be cited as the “Uniform Foreign-Country Money Judgments Recognition Act.” (Ga. L. 1975, p. 479, § 8; Ga. L. 2015, p. 996, § 2-1/SB 65.)

**The 2015 amendment**, effective July 1, 2015, inserted “shall be known and” and substituted “Uniform Foreign-Country” for “Georgia Foreign” in this Code section. See editor’s note for applicability.

**Editor’s notes.** — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides:

“(a) This Act shall be known and may be cited as the ‘Debtor Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General

Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”

Ga. L. 2015, p. 996, § 7-1/SB 65, not codified by the General Assembly, provides, in part: “Part 2 of this Act shall apply to all actions filed on or after July 1, 2015, in which the recognition of a foreign country judgment is raised.”



## JUDICIAL DECISIONS

**Cited** in *Blumberg v. Berland*, 678 F.2d 1068 (11th Cir. 1982); *Brown v. Rock*, 184 Ga. App. 699, 362 S.E.2d 480 (1987).

## RESEARCH REFERENCES

**U.L.A.** — Uniform Foreign Money-Judgments Recognition Act (U.L.A.) § 9.

## 9-12-111. Definitions.

As used in this article, the term:

(1) “Foreign country” means a government other than:

(A) The United States;

(B) Any state, district, commonwealth, territory, or insular possession of the United States; or

(C) Any other government with regard to which the decision in this state as to whether to recognize a judgment of such government’s court is initially subject to determination under the Full Faith and Credit Clause of the United States Constitution.

(2) “Foreign-country judgment” means any judgment of a court of a foreign country. (Ga. L. 1975, p. 479, § 1; Ga. L. 2015, p. 996, § 2-1/SB 65.)

**The 2015 amendment**, effective July 1, 2015, added present paragraph (1); re-designated former paragraph (1) as present paragraph (2) and substituted the present provisions for the former, which read: “‘Foreign judgment’ means any judgment of a foreign state granting or denying recovery of a sum of money other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.”; and deleted former paragraph (2), which read: “(2) ‘Foreign state’ means any governmental unit other than:

“(A) The United States;

“(B) Any state, district, commonwealth, territory, or insular possession of the United States; or

“(C) The Trust Territory of the Pacific Islands.” See editor’s note for applicability.

**Editor’s notes.** — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides:

“(a) This Act shall be known and may be cited as the ‘Debtor Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”

Ga. L. 2015, p. 996, § 7-1/SB 65, not codified by the General Assembly, provides in part: “Part 2 of this Act shall apply to all actions filed on or after July 1, 2015, in which the recognition of a foreign country judgment is raised.”



JUDICIAL DECISIONS

**Meaning of “foreign court.”** — Although court decisions refer to “foreign courts” in referring to sister states, the legislature in this section truly intended “foreign” to mean “nondomestic” courts of the United States. *Collins v. Peacock*, 147 Ga. App. 424, 249 S.E.2d 142 (1978).

**This article has no application to a**

**foreign judgment for support** in matrimonial or family matters. *Jacoby v. Jacoby*, 150 Ga. App. 725, 258 S.E.2d 534 (1979); *Knothe v. Rose*, 195 Ga. App. 7, 392 S.E.2d 570 (1990).

**Cited in** *Kronitz v. Fifth Ave. Dance Studio, Inc.*, 242 Ga. 398, 249 S.E.2d 80 (1978).

RESEARCH REFERENCES

**U.L.A.** — Uniform Foreign Money-Judgments Recognition Act (U.L.A.) § 1.

9-12-112. Applicability; burden of proof.

(a) Except as otherwise provided in subsection (b) of this Code section, this article applies to any foreign-country judgment to the extent that such judgment:

- (1) Grants or denies recovery of a sum of money; and
- (2) Under the law of the foreign country where rendered, is final, conclusive, and enforceable.

(b) This article shall not apply to a foreign-country judgment, even if such judgment grants or denies recovery of a sum of money, to the extent that such judgment is:

- (1) A judgment for taxes;
- (2) A fine or other penalty; or
- (3) A judgment for divorce, support, or maintenance, or any other judgment rendered in connection with domestic relations.

(c) A party seeking recognition of a foreign-country judgment has the burden of establishing that this article applies to such foreign-country judgment. (Ga. L. 1975, p. 479, § 2; Ga. L. 2015, p. 996, § 2-1/SB 65.)

**The 2015 amendment**, effective July 1, 2015, substituted the present provisions of this Code section for the former provisions, which read: “This article applies to any foreign judgment that is final, conclusive, and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal.” See editor’s note for applicability.

**Editor’s notes.** — Ga. L. 2015, p. 996,

§ 1-1/SB 65, not codified by the General Assembly, provides:

“(a) This Act shall be known and may be cited as the ‘Debtor Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and



creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”

Ga. L. 2015, p. 996, § 7-1/SB 65, not

codified by the General Assembly, provides, in part: “Part 2 of this Act shall apply to all actions filed on or after July 1, 2015, in which the recognition of a foreign country judgment is raised.”

### RESEARCH REFERENCES

**C.J.S.** — 50 C.J.S., Judgments, § 1273 et seq.

**U.L.A.** — Uniform Foreign Money-Judgments Recognition Act (U.L.A.) § 2.

**ALR.** — Judgment of court of foreign country as entitled to enforcement or extraterritorial effect in state court, 13 ALR4th 1109.

### 9-12-113. Recognition and enforcement of foreign-country judgments.

(a) Except as otherwise provided in subsection (b) of this Code section, a court of this state shall recognize a foreign-country judgment meeting the requirements of Code Section 9-12-112.

(b) A court of this state shall not recognize a foreign-country judgment if:

(1) The judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(2) The foreign court did not have personal jurisdiction over the defendant; or

(3) The foreign court did not have jurisdiction over the subject matter.

(4) The defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable the defendant to defend;

(5) The judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case;

(6) The judgment or cause of action on which the judgment is based is repugnant to the public policy of this state or of the United States;

(7) The judgment conflicts with another final and conclusive judgment;

(8) The proceedings in the foreign court were contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in such foreign court;



(9) In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action;

(10) The judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to such judgment; or

(11) The specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

(c) A party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition stated in subsection (b) of this Code section exists. (Ga. L. 1975, p. 479, §§ 3, 4; Ga. L. 2015, p. 996, § 2-1/SB 65.)

**The 2015 amendment**, effective July 1, 2015, designated the existing provisions as subsection (a); substituted the present provisions of subsection (a) for the former provisions, which read: “Except as provided in Code Sections 9-12-114 and 9-12-115, a foreign judgment meeting the requirements of Code Section 9-12-112 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit.”; redesignated former Code Section 9-12-114 as subsection (b); in subsection (b), substituted “A court of this state shall not recognize a foreign-country judgment” for “A foreign judgment shall not be recognized” in the introductory language, substituted “judicial system that” for “system which” in paragraph (b)(1), added “or” at the end of paragraph (b)(2), substituted “the defendant” for “him” in paragraph (b)(4), inserted “that deprived the losing party of an adequate opportunity to present its case” at the end of paragraph (b)(5), in paragraph (b)(6), inserted “judgment or” near the beginning and inserted “or of the United States” at the end; in paragraph (b)(8), substituted “determined” for “settled” and substituted “such foreign” for “that”, deleted “or” at the end of paragraph (b)(9), substituted the present provisions of paragraph (b)(10), for the former provisions, which read: “The party seeking to enforce the judgment fails to

demonstrate that judgments of courts of the United States and of states thereof of the same type and based on substantially similar jurisdictional grounds are recognized and enforced in the courts of the foreign state.”, and added paragraph (b)(11); and added subsection (c). See editor’s note for applicability.

**Cross references.** — Nonrecognition of foreign judgment attempting to modify Georgia judgment awarding permanent alimony or support, § 19-6-26. Application for permanent alimony or child support by person after grant of divorce to person’s spouse in foreign country, § 19-6-27.

**Editor’s notes.** — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides:

“(a) This Act shall be known and may be cited as the ‘Debtor Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”

Ga. L. 2015, p. 996, § 7-1/SB 65, not codified by the General Assembly, provides, in part: “Part 2 of this Act shall apply to all actions filed on or after July 1, 2015, in which the recognition of a foreign country judgment is raised.”



**Law reviews.** — For article discussing the enforcement of money judgments rendered in foreign jurisdictions in light of

the establishment of the foreign business enterprise in Georgia, see 27 Mercer L. Rev. 629 (1976).

### JUDICIAL DECISIONS

**Foreign judgment shall not be recognized** by the courts of this state if the foreign court did not have personal jurisdiction over the defendant. *Berry v. Jeff Hunt Mach. Co.*, 148 Ga. App. 35, 250 S.E.2d 813 (1978).

**Trial court erred in domesticating foreign judgment.** — Trial court erred when the court domesticated a judgment a seller obtained against a purchaser from the courts of Dubai, United Arab Emirates, because the seller provided no evi-

dence under the Georgia Foreign Money Judgments Recognition Act, O.C.G.A. § 9-12-114(10), that judgments of courts of the United States and of states thereof of the same type and based on substantially similar jurisdictional grounds were recognized and enforced in Dubai. *Shehadeh v. Alexander*, 315 Ga. App. 479, 727 S.E.2d 227 (2012).

**Cited in** *Kronitz v. Fifth Ave. Dance Studio, Inc.*, 242 Ga. 398, 249 S.E.2d 80 (1978).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 47 Am. Jur. 2d, Judgments, §§ 770, 772, 788 et seq., 798, 801.

**C.J.S.** — 50 C.J.S., Judgments, §§ 1273 et seq., 1325, 1358, 1359.

**U.L.A.** — Uniform Foreign Money-Judgments Recognition Act (U.L.A.) §§ 3, 4.

**ALR.** — Recent variations in rate of foreign exchange as affecting damages for tort, 20 ALR 899.

Conclusiveness as to merits of judgment of courts of foreign country, 46 ALR 439; 148 ALR 991.

Conclusiveness of decision of sister state on a contested hearing as to its own jurisdiction, 52 ALR 740.

Interlocutory judgment or decree in one state as bar to an action in another state, 84 ALR 721.

Validity and enforceability of judgment entered in sister state under a warrant of attorney to confess judgment, 39 ALR2d 1232.

Injunction against suit in another state or country for divorce or separation, 54 ALR2d 1240.

Judgment of court of foreign country as entitled to enforcement or extraterritorial effect in state court, 13 ALR4th 1109.

Validity, construction, and application of Uniform Enforcement of Foreign Judgments Act, 31 ALR4th 706.

### 9-12-114. Recognition of personal jurisdiction.

(a) A foreign-country judgment shall not be refused recognition for lack of personal jurisdiction if:

(1) The defendant was served personally in the foreign country;

(2) The defendant voluntarily appeared in the proceedings other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over the defendant;

(3) Prior to the commencement of the proceedings, the defendant had agreed to submit to the jurisdiction of the foreign court, with respect to the subject matter involved;



(4) The defendant was domiciled in the foreign country when the proceedings were instituted or was a corporation or other form of business organization that had its principal place of business in or was organized under the laws of the foreign country;

(5) The defendant had a business office in the foreign country and the proceedings in the foreign court involved a cause of action arising out of business done by the defendant through that office in the foreign country; or

(6) The defendant operated a motor vehicle or airplane in the foreign country and the proceedings involved a cause of action arising out of such operation.

(b) The courts of this state may recognize other bases of personal jurisdiction other than those listed in subsection (a) of this Code section. (Ga. L. 1975, p. 479, § 5; Code 1981, § 9-12-114, as redesignated by Ga. L. 2015, p. 996, § 2-1/SB 65.)

**The 2015 amendment**, effective July 1, 2015, redesignated former Code Section 9-12-115 as present Code Section 9-12-114; substituted “country” for “state” throughout; in subsection (a), substituted “foreign-country” for “foreign” in the introductory language, substituted “the defendant” for “him” in paragraph (a)(2), in paragraph (a)(3), deleted “expressly in writing” following “had agreed” and deleted “in such proceedings, in an action by the party seeking to enforce the judgment” following “matter involved”, substituted “or was a corporation or other form of business organization that had its principal place of business in or was organized under the laws of the foreign country” for “, being a body corporate, then had its principal place of business or was incorporated in the foreign state” in paragraph (a)(4), and substituted “country” for “state”; provided, however, that a business office in the foreign state which it maintained for the transaction of business by a subsidiary corporation of the defendant but which is not held out as a business office of the defendant shall not be deemed to be a business office of the defendant” at the end of paragraph (a)(5); and substituted “; other than those listed” for “provided, however, that if the proceedings in the

foreign court involved a cause of action arising out of business activities in the foreign state, the judgment shall not be recognized unless there is a basis for personal jurisdiction as specified” in subsection (b).

**Editor’s notes.** — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides:

“(a) This Act shall be known and may be cited as the ‘Debtor Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”

Ga. L. 2015, p. 996, § 2-1, effective July 1, 2015, redesignated former Code Section 9-12-114 as present Code Section 9-12-113(b).

Ga. L. 2015, p. 996, § 7-1/SB 65, not codified by the General Assembly, provides, in part: “Part 2 of this Act shall apply to all actions filed on or after July 1, 2015, in which the recognition of a foreign country judgment is raised.”



## JUDICIAL DECISIONS

**Collateral attack on petition to domesticate foreign judgment** on ground that the judgment was based on lack of personal jurisdiction is precluded in this state only if the defendant has appeared in the foreign court and has thus had an

opportunity to litigate the issue. *Borg-Warner Health Prods., Inc. v. May*, 154 Ga. App. 482, 268 S.E.2d 770 (1980).

**Cited** in *Glover v. Clark*, 161 Ga. App. 552, 288 S.E.2d 887 (1982).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 47 Am. Jur. 2d, Judgments, § 788 et seq.

**C.J.S.** — 50 C.J.S., Judgments, §§ 1282, 1300 et seq., 1326, 1348, 1376.

**U.L.A.** — Uniform Foreign Money-Judgments Recognition Act (U.L.A.) § 5.

**ALR.** — Conclusiveness of decision of sister state on a contested hearing as to its own jurisdiction, 52 ALR 740.

Injunction against suit in another state or country for divorce or separation, 54 ALR2d 1240.

Construction and application of state statutes or rules of court predicated in personam jurisdiction over nonresidents of foreign corporations on making or performing a contract within the state, 23 ALR3d 551.

## 9-12-115. Procedure for recognition.

(a) If recognition of a foreign-country judgment is sought as an original matter, the issue of recognition shall be raised by filing an action seeking recognition of such foreign-country judgment.

(b) If recognition of a foreign-country judgment is sought in a pending action, the issue of recognition may be raised by counterclaim, cross-claim, or third-party claim.

(c) Chapter 11 of this title shall apply to any claim, counterclaim, cross-claim, or third-party claim for recognition of a foreign-country judgment. (Code 1981, § 9-12-115, enacted by Ga. L. 2015, p. 996, § 2-1/SB 65.)

**Effective date.** — This Code section became effective July 1, 2015. See editor's note for applicability.

**Editor's notes.** — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides:

“(a) This Act shall be known and may be cited as the ‘Debtor Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and

creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”

Ga. L. 2015, p. 996, § 2-1, effective July 1, 2015, redesignated former Code Section 9-12-115 as present Code Section 9-12-114.

Ga. L. 2015, p. 996, § 7-1/SB 65, not codified by the General Assembly, provides, in part: “Part 2 of this Act shall apply to all actions filed on or after July 1, 2015, in which the recognition of a foreign country judgment is raised.”



**9-12-116. Effect of recognition of foreign-country judgments.**

If the court in a proceeding under Code Section 9-12-115 finds that the foreign-country judgment is entitled to recognition under this article then, to the extent that the foreign-country judgment grants or denies recovery of a sum of money, the foreign-country judgment is:

(1) Conclusive between the parties to the same extent as the judgment of a sister state entitled to full faith and credit in this state would be conclusive; and

(2) Enforceable in the same manner and to the same extent as a judgment rendered in this state. (Code 1981, § 9-12-116, enacted by Ga. L. 2015, p. 996, § 2-1/SB 65.)

**Effective date.** — This Code section became effective July 1, 2015. See editor's note for applicability.

**Editor's notes.** — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides:

“(a) This Act shall be known and may be cited as the ‘Debtor Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and

creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”

Ga. L. 2015, p. 996, § 2-1, effective July 1, 2015, redesignated former Code Section 9-12-116 as present Code Section 9-12-117.

Ga. L. 2015, p. 996, § 7-1/SB 65, not codified by the General Assembly, provides, in part: “Part 2 of this Act shall apply to all actions filed on or after July 1, 2015, in which the recognition of a foreign country judgment is raised.”

**9-12-117. Stay pending appeal.**

If a party establishes that an appeal from a foreign-country judgment is pending or will be taken, the court may stay the proceedings with regard to the foreign-country judgment until the time for appeal expires or the appellant has had sufficient time to prosecute the appeal and has failed to do so. (Ga. L. 1975, p. 479, § 6; Code 1981, § 9-12-117, as redesignated by Ga. L. 2015, p. 996, § 2-1/SB 65.)

**The 2015 amendment,** effective July 1, 2015, redesignated former Code Section 9-12-116 as present Code Section 9-12-117, and rewrote the Code section, which formerly read: “If the defendant satisfies the court either that an appeal is pending or that he is entitled and intends to appeal from the foreign judgment, the court may stay the proceedings until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal.” See editor's note for applicability.

**Editor's notes.** — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides:

“(a) This Act shall be known and may be cited as the ‘Debtor Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized



laws affecting such rights, responsibilities, and relationships.”

Ga. L. 2015, p. 996, § 2-1, effective July 1, 2015, redesignated former Code Section 9-12-117 as present Code Section 9-12-119.

Ga. L. 2015, p. 996, § 7-1/SB 65, not codified by the General Assembly, provides, in part: “Part 2 of this Act shall apply to all actions filed on or after July 1, 2015, in which the recognition of a foreign country judgment is raised.”

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 5 Am. Jur. 2d, Appellate Review, § 398 et seq. 47 Am. Jur. 2d, Judgments, §§ 775, 776.

**C.J.S.** — 50 C.J.S., Judgments, § 850.

**U.L.A.** — Uniform Foreign Money-Judgments Recognition Act (U.L.A.) § 6.

### 9-12-118. Uniform construction.

In applying and construing this article, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact the “Uniform Foreign-Country Money Judgments Recognition Act.” (Code 1981, § 9-12-118, enacted by Ga. L. 2015, p. 996, § 2-1/SB 65.)

**Effective date.** — This Code section became effective July 1, 2015. See editor’s note for applicability.

**Editor’s notes.** — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides:

“(a) This Act shall be known and may be cited as the ‘Debtor Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing

uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”

Ga. L. 2015, p. 996, § 7-1/SB 65, not codified by the General Assembly, provides, in part: “Part 2 of this Act shall apply to all actions filed on or after July 1, 2015, in which the recognition of a foreign country judgment is raised.”

### 9-12-119. Situations not covered by article.

This article does not prevent the recognition under principles of comity or otherwise of a foreign-country judgment not within the scope of this article. (Ga. L. 1975, p. 479, § 7; Code 1981, § 9-12-119, as redesignated by Ga. L. 2015, p. 996, § 2-1/SB 65.)

**The 2015 amendment,** effective July 1, 2015, redesignated former Code Section 9-12-117 as present Code Section 9-12-119, and substituted “under principles of comity or otherwise of a foreign-country judgment not within the scope of” for “of a foreign judgment in situations not covered by”. See editor’s note for applicability.

**Editor’s notes.** — Ga. L. 2015, p. 996,

§ 1-1/SB 65, not codified by the General Assembly, provides:

“(a) This Act shall be known and may be cited as the ‘Debtor Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and



creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”  
Ga. L. 2015, p. 996, § 7-1/SB 65, not

codified by the General Assembly, provides, in part: “Part 2 of this Act shall apply to all actions filed on or after July 1, 2015, in which the recognition of a foreign country judgment is raised.”

RESEARCH REFERENCES

C.J.S. — 50 C.J.S., Judgments, § 1273 et seq.  
U.L.A. — Uniform Foreign Money-Judgments Recognition Act (U.L.A.) § 7.

ALR. — Conclusiveness of decision of sister state on a contested hearing as to its own jurisdiction, 52 ALR 740.

ARTICLE 6

ENFORCEMENT OF FOREIGN JUDGMENTS

JUDICIAL DECISIONS

Notice of intent to rely on foreign law. — Because the use of O.C.G.A. § 9-12-130 et seq. to domesticate a foreign judgment requires proof that the state in which the foreign judgment was entered adopted the Uniform Enforcement of Foreign Judgments Act in substantially the same form as Georgia, and such foreign law would be published by authority, it is the trial court’s duty to take judicial notice of it. P.G.L. & C.C. Employees Credit Union v. Kimball, 221 Ga. App. 108, 470 S.E.2d 501 (1996).

Revival of dormant federal judgment. — Provision of O.C.G.A. § 9-12-61 for revival of a dormant judgment is applicable to revive a dormant federal judgment. Okekpke v. Commerce Funding Corp., 218 Ga. App. 705, 463 S.E.2d 23 (1995).

Counterclaims by judgment debtors prohibited. — Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., is a special statutory proceeding for filing a foreign judgment and does not provide for the filing of counterclaims by the judgment debtor. Hammette v. Eickemeyer, 203 Ga. App. 243, 416 S.E.2d 824 (1992).

Florida court order. — Husband was not required to undertake domestication proceedings, with respect to a Florida court order that the wife turn over personal property to him, as a condition precedent to bringing a conversion action in Georgia based on his alleged ownership of the property. Hughes v. Hughes, 193 Ga. App. 72, 387 S.E.2d 29 (1989).

Earlier obtained but later domesticated foreign judgment. — Because a foreign judgment cannot be enforced until it is domesticated, a Georgia judgment had priority over an earlier obtained, but later domesticated, foreign judgment against the same debtor. NationsBank v. Gibbons, 226 Ga. App. 610, 487 S.E.2d 417 (1997).

9-12-130. Short title.

This article may be cited as the “Uniform Enforcement of Foreign Judgments Law.” (Code 1981, § 9-12-130, enacted by Ga. L. 1986, p. 380, § 1.)



**Law reviews.** — For annual survey of trial practice and procedure, see 38 Mercer L. Rev. 383 (1986).

## JUDICIAL DECISIONS

**Action barred.** — Because a judgment creditor sought to domesticate a foreign judgment but did not notify the trial court of the creditor's intent to rely on the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., it was an action to enforce a judgment which was barred because the action was filed more than five years after the judgment was entered. *Williams v. American Credit Servs., Inc.*, 229 Ga. App. 801, 495 S.E.2d 121 (1998).

Trial court properly found that an action to enforce a Florida judgment entered against a judgment debtor was time-barred under Georgia law, granting the judgment debtor's motion to stay enforcement of that judgment, as the statute of limitations on enforcement of the Florida judgment had run under the law of Georgia, the receiving state, when viewed from the date of rendition of the judgment in the State of Florida, the state in which the judgment originated; moreover, to run the Georgia time limitation from the date of the filing of the judgment rather than from the date of rendition of the judgment would be contrary to the language of the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., and of Georgia's dormancy-of-judgment and judgment-renewal statutes, O.C.G.A. §§ 9-12-60 and 9-12-61. *Corzo Trucking Corp. v. West*, 281 Ga. App. 361, 636 S.E.2d 39 (2006).

**Appeal.** — Proper method for attacking a foreign judgment filed in Georgia under the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., is a motion to set aside under O.C.G.A. § 9-11-60(d), and the only appealable judgment in a case where a creditor sought to domesticate a New Jersey judgment in Georgia was the order denying the motion to set aside; because the corporation and the individual failed to appeal the denial of the motion to set aside by application, the order directing the corporation and the individual to pay

in accordance with the New Jersey judgment was a nullity and provided no basis for review so the appellate court had no jurisdictional basis for the appeal and the appeal was dismissed. *Arrowhead Alternator, Inc. v. CIT Communs. Fin. Corp.*, 268 Ga. App. 464, 602 S.E.2d 231 (2004).

**Applicability.** — Procedures set forth in the Uniform Reciprocal Enforcement of Support Act, former O.C.G.A. § 9-11-40 et seq., and the Uniform Interstate Family Support Act, O.C.G.A. § 19-11-100 et seq., for registering and enforcing foreign support judgments are in addition to and not exclusive of the procedures in O.C.G.A. § 9-12-130 et seq. to file and domesticate judgments for enforcement; therefore, the trial court had jurisdiction to consider a mother's petition seeking interest due on child support owing on a Tennessee divorce decree. *Dial v. Adkins*, 265 Ga. App. 650, 595 S.E.2d 332 (2004).

When a judgment creditor registered a judgment the creditor obtained against judgment debtors in federal court in another state in the appropriate federal court in Georgia, pursuant to 28 U.S.C. § 1963, that judgment was no longer a "foreign" judgment, under 28 U.S.C. § 1962, which required the creditor's compliance with the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., so the creditor could proceed to foreclose on the debtors' property without observing the procedures dictated in § 9-12-130 et seq., and the debtors were not entitled to injunctive relief against the creditor for failure to comply with that statutory scheme. *Guin v. Alarm Detection Indus.*, 278 Ga. App. 114, 628 S.E.2d 376 (2006).

**Domesticating a judgment.** — Although the debtor did not receive notice of a creditor's motion for confirmation and entry of judgment in a Texas custody case, this did not render the Georgia trial court's order domesticating the judgment improper because the judgment was not entered in a new suit requiring service of



process for legal action. *Kahlig v. Martinez*, 272 Ga. App. 491, 612 S.E.2d 833 (2005).

**Failure to negate defense of lack of personal jurisdiction.** — It was error to domesticate an Ohio judgment under O.C.G.A. § 9-12-130. The judgment creditor had not offered admissible evidence to make a prima facie showing that the judgment debtor transacted business in the State of Ohio as contemplated by Ohio's long-arm statute or that the judgment debtor purposely established contacts with Ohio; thus, it had failed to negate the judgment debtor's defense of lack of personal jurisdiction. *Std. Bldg. Co. v. Wallen Concept Glazing, Inc.*, 298 Ga. App. 443, 680 S.E.2d 527 (2009).

**Failure to raise jurisdictional area in foreign court.** — In an action to enforce a foreign judgment from Arkansas, the trial court erred by setting aside the judgment against an individual defendant because that individual defendant appeared in the Arkansas court by filing in that court a motion to dismiss the action; thus, the individual defendant waived the defense of lack of personal jurisdiction by failing to raise the issue in the motion to dismiss in the Arkansas court. *Carter v. Heritage Corner, Ltd.*, 320 Ga. App. 828, 741 S.E.2d 182 (2013).

**Cited in** *Eastlawn Corp. v. Bankers Equip. Leasing Co.*, 211 Ga. App. 551, 439 S.E.2d 753 (1993).

### 9-12-131. "Foreign judgment" defined.

As used in this article, the term "foreign judgment" means a judgment, decree, or order of a court of the United States or of any other court that is entitled to full faith and credit in this state. (Code 1981, § 9-12-131, enacted by Ga. L. 1986, p. 380, § 1.)

**Cross references.** — Georgia Foreign Money Judgments Recognition Act, § 9-12-110 et seq.

## JUDICIAL DECISIONS

**District of Columbia judgment** is a foreign judgment as defined in the Uniform Enforcement of Foreign Judgment Law, O.C.G.A. § 9-12-130 et seq., and enforceable in this state. *Thompson v. Potomac River Front Ltd. Partnership*, 217 Ga. App. 564, 458 S.E.2d 390 (1995).

**Foreign judgment does not include a judgment from an in state federal court.** — Judgments from federal courts within the state are judgments obtained within the state and are not included in the definition of a foreign judgment that would require domestication before obtaining lien priority. *Tunnelite, Inc. v. Estate of Sims*, 266 Ga. App. 476, 597 S.E.2d 555 (2004).

**Appeal.** — Appeal of an order denying appellants' motion to vacate a foreign judgment was dismissed because the ap-

pellants failed to follow the correct procedure for appealing the trial court's decision; the appellants never filed a motion to set aside the judgment under O.C.G.A. § 9-11-60(d), which was the proper method for attacking a foreign judgment filed under the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq.; the underlying subject matter of the appellants' motions was an attempt to set aside a judgment, and the denial of the appellants' motions was subject to discretionary appeal because the underlying subject matter generally controlled over the relief sought in determining the proper procedure to follow to appeal. *Noaha, LLC v. Vista Antiques & Persian Rugs, Inc.*, 306 Ga. App. 323, 702 S.E.2d 660 (2010).



**9-12-132. Filing of judgment; force and effect following filing.**

A copy of any foreign judgment authenticated in accordance with an act of Congress or statutes of this state may be filed in the office of the clerk of any court of competent jurisdiction of this state. The clerk shall treat the foreign judgment in the same manner as a judgment of the court in which the foreign judgment is filed. A filed foreign judgment has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, staying, enforcing, or satisfying as a judgment of the court in which it is filed and may be enforced or satisfied in like manner. (Code 1981, § 9-12-132, enacted by Ga. L. 1986, p. 380, § 1.)

**Cross references.** — Judgments generally, § 9-12-40 et seq. Authentication of laws and judicial records of other states, § 24-9-922.

**JUDICIAL DECISIONS**

**Standard in motion to set aside foreign judgment.** — In a motion to set aside a foreign judgment, the standard is identical to that of O.C.G.A. § 9-11-60(d). The defendant must show that the judgment is defective due to lack of jurisdiction over the person or subject matter due to fraud, accident, or mistake, or due to a nonamendable defect on the face of the pleadings. *Arnold v. Brundidge Banking Co.*, 209 Ga. App. 278, 433 S.E.2d 388 (1993).

**Collateral attack on foreign judgment.** — When suit is brought to domesticate a foreign judgment, that judgment may be attacked collaterally on the ground that the foreign court in which the judgment was obtained lacked personal jurisdiction over the defendants. If the foreign judgment was obtained by default, no presumption of personal jurisdiction exists, and the burden is on the party seeking to domesticate the judgment to negate the defense of lack of jurisdiction. *Sanwa Leasing Corp. v. Stan Hunt Constr. Co.*, 214 Ga. App. 837, 449 S.E.2d 347 (1994).

Plaintiff's judgment obtained in Texas by default against a Georgia resident was properly set aside after the plaintiff failed to negate the defense of lack of personal jurisdiction. *Chambers v. Navare*, 231 Ga. App. 318, 498 S.E.2d 173 (1998).

Because a trial court was required by

O.C.G.A. §§ 9-11-60 and 9-12-132 to accord a foreign judgment full faith and credit if the judgment was proper under the law in which the judgment was rendered, the court erred in holding that Georgia law governed the filing of the debtors' answer in a New York case; the trial court erred in granting a motion to set aside the judgment since the debtors were in default for failing to timely serve an answer upon counsel in accordance with N.Y. C.P.L.R. 320(a), 2103(b). *LeRoy Vill. Green Residential Health Care Facility, Inc. v. Downs*, 310 Ga. App. 754, 713 S.E.2d 728 (2011).

**Stipulation for extension of time was not appearance.** — Trial court erred in denying a corporation's motion to set aside a New Jersey judgment pursuant to O.C.G.A. § 9-12-132 because New Jersey lacked personal jurisdiction; a stipulation for an extension of time to answer the complaint filed with the New Jersey court did not constitute an appearance so as to submit the corporation to that court's jurisdiction. *Homeowners Mortg. of Am., Inc. v. Chase Home Fin., LLC*, 294 Ga. App. 153, 668 S.E.2d 561 (2008).

**Retroactive application warranted.** — Because O.C.G.A. § 9-12-132 is a law that acts upon remedies alone, the trial court erred by failing to apply the statute retroactively. *Kaylor v. Turner*, 210 Ga. App. 2, 435 S.E.2d 233 (1993).



**Domestication prior to modification.** — Georgia permits modification of a foreign divorce decree only after domestication of that judgment, and since a final divorce decree remained a Texas judgment, the court had no authority to modify its provision for permanent child support. *Pearson v. Pearson*, 263 Ga. 400, 435 S.E.2d 40 (1993).

**Stay of enforcement of foreign judgment proper.** — Trial court properly stayed enforcement of an original South Carolina judgment under O.C.G.A. § 9-12-134 because an appeal was pending, and once the South Carolina appellate court issued a remittitur and the lower court entered a revised judgment, the appellee properly filed the revised South Carolina judgment and moved to lift the stay, and once the revised South Carolina judgment was filed, that judgment, like the original, had the same effect as a Georgia judgment under O.C.G.A. § 9-12-132. The revised judgment had the same effect a Georgia judgment would have if the judgment had been revised in accordance with a remittitur received from a Georgia appellate court, and the stay was, therefore, properly lifted to allow enforcement of that revised judgment. *Noaha, LLC v. Vista Antiques & Persian Rugs, Inc.*, 306 Ga. App. 323, 702 S.E.2d 660 (2010).

**Venue.** — Although O.C.G.A. § 9-12-132 of the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., did not contain a venue provision, Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. § 14-2-510(b)(1) provided that venue was in the county where the corporation maintained the corporation's registered office; therefore, the Superior Court of Cobb County erred in denying the corporation's motion to set aside a foreign judgment when the corporation's registered office was in Henry County. *Cherwood, Inc. v. Marlin Leasing Corp.*, 268 Ga. App. 64, 601 S.E.2d 356 (2004).

**Action time-barred.** — Trial court properly found that an action to enforce a Florida judgment entered against a judgment debtor was time-barred under Georgia law, granting the judgment debtor's motion to stay enforcement of that judg-

ment as the statute of limitations on enforcement of the Florida judgment had run under the law of Georgia, the receiving state, when viewed from the date of rendition of the judgment in the State of Florida, the state in which the judgment originated; moreover, to run the Georgia time limitation from the date of the filing of the judgment rather than from the date of rendition of the judgment would be contrary to the language of the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., and of Georgia's dormancy-of-judgment and judgment-renewal statutes, O.C.G.A. §§ 9-12-60 and 9-12-61. *Corzo Trucking Corp. v. West*, 281 Ga. App. 361, 636 S.E.2d 39 (2006).

Corporation and two individuals could not enforce a 1985 Florida judgment, which was renewed in 2006, in Georgia pursuant to the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., because by their operation in tandem, O.C.G.A. §§ 9-12-60(a)(1) and 9-12-61 created a 10-year statute of limitation for the enforcement of Georgia judgments and O.C.G.A. § 9-12-132 did not allow a Florida judgment to have a longer life than a Georgia judgment. *Corzo Trucking Corp. v. West*, 296 Ga. App. 399, 674 S.E.2d 414 (2009).

**Appeal.** — Denial of a motion to set aside a judgment filed under O.C.G.A. Art. 6, Ch. 12, T. 9 is treated no differently for appeal purposes than any other judgment. *Okepkpe v. Commerce Funding Corp.*, 218 Ga. App. 705, 463 S.E.2d 23 (1995).

Proper method for attacking a foreign judgment filed in Georgia under the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., is a motion to set aside under O.C.G.A. § 9-11-60(d), and the only appealable judgment in a case where a creditor sought to domesticate a New Jersey judgment in Georgia was the order denying the motion to set aside; because the corporation and the individual failed to appeal the denial of the motion to set aside by application, the order directing the corporation and the individual to pay in accordance with the New Jersey judgment was a nullity and provided no basis for



review so the appellate court had no jurisdictional basis for the appeal and the appeal was dismissed. *Arrowhead Alternator, Inc. v. CIT Communs. Fin. Corp.*, 268 Ga. App. 464, 602 S.E.2d 231 (2004).

Appeal of an order denying the appellants' motion to vacate a foreign judgment was dismissed because the appellants failed to follow the correct procedure for appealing the trial court's decision; appellants never filed a motion to set aside the judgment under O.C.G.A. § 9-11-60(d), which was the proper method for attack-

ing a foreign judgment under the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq.; the underlying subject matter of the appellants' motions was an attempt to set aside a judgment, and the denial of the appellants' motions was subject to discretionary appeal because the underlying subject matter generally controlled over the relief sought in determining the proper procedure to follow to appeal. *Noaha, LLC v. Vista Antiques & Persian Rugs, Inc.*, 306 Ga. App. 323, 702 S.E.2d 660 (2010).

**9-12-133. Filing of foreign judgment; notice to judgment debtor; Code Section 9-11-4 inapplicable to article.**

(a) At the time a foreign judgment is filed, the judgment creditor or the judgment creditor's attorney shall make and file with the clerk of the court an affidavit showing the name and last known post office address of the judgment debtor and the judgment creditor.

(b) The clerk shall promptly mail notice of the filing of the foreign judgment to the judgment debtor at the address given and shall note the mailing in the docket. The notice must include the name and post office address of the judgment creditor and, if the judgment creditor has an attorney in this state, the attorney's name and address. The judgment creditor may mail a notice of the filing of the judgment to the judgment debtor and may file proof of mailing with the clerk. Lack of mailing notice of filing by the clerk does not affect the enforcement proceedings if proof of mailing by the judgment creditor has been filed.

(c) The provisions of Code Section 9-11-4 shall not apply to this article. (Code 1981, § 9-12-133, enacted by Ga. L. 1986, p. 380, § 1; Ga. L. 2015, p. 996, § 5-1/SB 65.)

**The 2015 amendment**, effective July 1, 2015, added subsection (c).

**Editor's notes.** — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides:

“(a) This Act shall be known and may be cited as the ‘Debtor Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the

states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships.”

**9-12-134. Appeal or stay of foreign judgment; security for satisfaction.**

(a) If the judgment debtor shows the court that an appeal from the foreign judgment is pending or will be taken or that a stay of execution



has been granted and proves that the judgment debtor has furnished the security for the satisfaction of the judgment required by the state in which it was rendered, the court shall stay enforcement of the foreign judgment until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated.

(b) If the judgment debtor shows the court any ground on which enforcement of a judgment of the court of this state would be stayed, including the ground that an appeal from the foreign judgment is pending or will be taken or that the time for taking such an appeal has not yet expired, the court shall stay enforcement of the foreign judgment for an appropriate period until all available appeals are concluded or the time for taking all appeals has expired and require the same security for satisfaction of the judgment that is required in this state, subject to the provisions of subsections (b) and (f) of Code Section 5-6-46. (Code 1981, § 9-12-134, enacted by Ga. L. 1986, p. 380, § 1; Ga. L. 2000, p. 228, § 3; Ga. L. 2004, p. 980, § 2.)

**Editor's notes.** — Ga. L. 2000, p. 228, § 1, not codified by the General Assembly, provides: "The Act shall be known and may be cited as the 'Civil Litigation Improvement Act of 2000.'"

Ga. L. 2004, p. 980, § 4, not codified by the General Assembly, provides that the

amendment by that Act shall apply to cases pending on or filed on or after May 17, 2004.

**Law reviews.** — For note on 2000 amendment of this Code section, see 17 Ga. St. U.L. Rev. 37 (2000).

## JUDICIAL DECISIONS

**Enforcement of support order.** — After the defendant failed to investigate paternity despite his suspicion that he was not the father of all his wife's children, and since his failure to investigate was not caused by any alleged misrepresentation by his former spouse, he failed to show either actionable fraud or that his lack of investigation was unmixed with his own "negligence or fault," and the trial court erred in staying enforcement of an out-of-state support order. *Department of Human Resources v. Fenner*, 235 Ga. App. 233, 510 S.E.2d 534 (1998).

**Motion for stay.** — Trial court properly found that an action to enforce a Florida judgment entered against a judgment debtor was time-barred under Georgia law, granting the judgment debtor's motion to stay enforcement of that judgment as the statute of limitations on enforcement of the Florida judgment had run under the law of Georgia, the receiving state, when viewed from the date of

rendition of the judgment in the State of Florida, the state in which the judgment originated; moreover, to run the Georgia time limitation from the date of the filing of the judgment rather than from the date of rendition of the judgment would be contrary to the language of the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., and of Georgia's dormancy-of-judgment and judgment-renewal statutes, O.C.G.A. §§ 9-12-60 and 9-12-61. *Corzo Trucking Corp. v. West*, 281 Ga. App. 361, 636 S.E.2d 39 (2006).

**Grant of stay of filed foreign judgment erroneous.** — Grant of a stay of a filed foreign judgment was erroneous because, under subsection (b) of O.C.G.A. § 9-12-134, a judgment rendered by a court in Georgia is not subject to the limitation period imposed on foreign judgments by O.C.G.A. § 9-3-20; rather, judgments filed under the Uniform Law are subject to a stay of execution if the judg-



ments are dormant under O.C.G.A. § 9-12-60(a). *Aetna Ins. Co. v. Williams*, 237 Ga. App. 881, 517 S.E.2d 109 (1999).

**Stay of enforcement of foreign judgment proper.** — Trial court properly stayed enforcement of an original South Carolina judgment under O.C.G.A. § 9-12-134 because an appeal was pending, and once the South Carolina appellate court issued a remittitur and the lower court entered a revised judgment, the appellee properly filed the revised South Carolina judgment and moved to lift the stay, and once the revised South

Carolina judgment was filed, the judgment, like the original, had the same effect as a Georgia judgment under O.C.G.A. § 9-12-132. The revised judgment had the same effect a Georgia judgment would have if the judgment had been revised in accordance with a remittitur received from a Georgia appellate court, and the stay was, therefore, properly lifted to allow enforcement of that revised judgment. *Noaha, LLC v. Vista Antiques & Persian Rugs, Inc.*, 306 Ga. App. 323, 702 S.E.2d 660 (2010).

### 9-12-135. Clerk's fees.

A person filing a foreign judgment shall pay to the clerk of court the same sums as in civil cases in superior court as provided in Code Section 15-6-77. Fees for other enforcement proceedings shall be as otherwise provided by law. (Code 1981, § 9-12-135, enacted by Ga. L. 1986, p. 380, § 1; Ga. L. 1988, p. 320, § 1; Ga. L. 1991, p. 1324, § 3.)

### 9-12-136. Actions to enforce judgments preserved.

The judgment creditor retains the right to bring an action to enforce a judgment instead of proceeding under this article. (Code 1981, § 9-12-136, enacted by Ga. L. 1986, p. 380, § 1.)

## JUDICIAL DECISIONS

**Statute of limitation not a bar to filing foreign judgment.** — Five-year statute of limitation of O.C.G.A. § 9-3-20 did not bar the filing and enforcement of a properly authenticated foreign judgment

under the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq. *Wright v. Trust Co. Bank*, 219 Ga. App. 551, 466 S.E.2d 74 (1995).

### 9-12-137. Uniform construction.

This article shall be interpreted and construed to achieve its general purposes to make the law of those states which enact it uniform. (Code 1981, § 9-12-137, enacted by Ga. L. 1986, p. 380, § 1.)

### 9-12-138. Judgments to which article applies.

This article shall apply to foreign judgments of other states only if those states have adopted the "Uniform Enforcement of Foreign Judgments Act" in substantially the same form as this article. (Code 1981, § 9-12-138, enacted by Ga. L. 1986, p. 380, § 1.)



CHAPTER 13

EXECUTIONS AND JUDICIAL SALES

Article 1		Sec.	
General Provisions			
Sec.		9-13-35.	Effect of transfer by attorney; ratification.
9-13-1.	Entry and signing of judgment prerequisite to execution.	9-13-36.	Transfer of execution upon payment; status of transferee; recording necessary to preserve lien; exception for tax executions.
9-13-2.	Execution suspended by appeal.	Article 3	
9-13-3.	Execution to follow judgment.	Property Against Which Execution Levied	
9-13-4.	Judge may frame executions.	9-13-50.	Designation by defendant of property to be levied on; when sheriff bound thereby.
9-13-5.	Amendment of execution — To conform to judgment or time of return.	9-13-51.	Sale of property subject to lien; order of application to payment.
9-13-6.	Amendment of execution — To conform to amended judgment.	9-13-52.	When sheriff may levy on and sell land outside county.
9-13-7.	Amendment of execution — To correct mistake in issuance; alias execution.	9-13-53.	When constable may levy on land; sale by sheriff.
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9-13-9.	When execution returnable.	9-13-55.	Seizure prerequisite to sale of personalty.
9-13-10.	Issuance of execution; to whom directed; on what property levied.	9-13-56.	Future interests in personalty.
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9-13-12.	Entry of levy on process.	9-13-58.	Corporation's disclosure of worth of defendant's shares mandated; refusal treated as contempt.
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9-13-14.	Bonds taken by executing officers valid; rights of plaintiffs not affected.	9-13-60.	Taking up of debt to give defendant legal title to property; notice of levy and sale; application of proceeds.
9-13-15.	Measure of damages on forthcoming bond.	Article 4	
9-13-16.	Penalty for fraudulent levy.	Satisfaction or Discharge of Judgment and Execution	
Article 2		9-13-70.	Suspension of execution for 60 days pending payment; bond.
Parties in Execution		9-13-71.	Sufficient levy on personalty
9-13-30.	Execution against sureties and endorsers.		
9-13-31.	Execution against principal and his surety on appeal.		
9-13-32.	Execution following death of defendant.		
9-13-33.	Executions using partnership name valid.		
9-13-34.	Right to transfer execution; status of transferee.		



- Sec. prima-facie satisfaction; effect of dismissal.
- 9-13-72. Release of property subject to execution.
- 9-13-73. Application of fund to younger lien with senior lienholder's consent.
- 9-13-74. Release by agreement.
- 9-13-75. Setoff of judgments; collection of balance.
- 9-13-76. Execution by defendant after setoff.
- 9-13-77. Control of execution after payment — By security.
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- 9-13-79. Partial payments to be entered.
- 9-13-80. Execution to be canceled when satisfied; private right of action; damages.

### Article 5

#### Claims

- 9-13-90. Claims authorized; to be on oath.
- 9-13-91. Bond and security for damages; how damages determined.
- 9-13-92. Affidavit of indigence.
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- 9-13-94. Forthcoming bond for possession of property; amount and condition; not authorized for realty; when and where recoverable.
- 9-13-95. Execution of affidavit and bond by partner or joint owner.
- 9-13-96. When plaintiff in execution may give forthcoming bond.
- 9-13-97. Sale of property on claimants' application; order; advertisement; disposition of proceeds.
- 9-13-98. When and where claim, levy, and execution to be returned.
- 9-13-99. Return of claim or illegality against execution from probate court.
- 9-13-100. Claim to be tried by jury.
- 9-13-101. Additional oath of jurors; damages and costs when claim made for delay.

- Sec. Burden of proof.
- 9-13-102. Withdrawal or discontinuance of claim limited.
- 9-13-103. Trial of damage issue where claim dismissed or withdrawn.
- 9-13-104. How damages assessed.
- 9-13-105. Withdrawal of original execution and filing of copy.
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### Article 6

#### Illegality

- 9-13-120. Affidavit of illegality — When authorized; bond and security.
- 9-13-121. Affidavit of illegality — To show lack of service; not available to go behind judgment.
- 9-13-122. Affidavit of illegality — Not available for excessive levy generally.
- 9-13-123. Affidavit of illegality — By whom filed.
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- 9-13-125. Affidavit of illegality — When and how amendable.
- 9-13-126. Amount and condition of forthcoming bond.
- 9-13-127. Suspension of execution; return of execution, affidavit, and bond; determination by court; issue tried by jury.
- 9-13-128. Damages for delay; procedure following dismissal or withdrawal of illegality.
- 9-13-129. Property subject to other executions; retention of sale proceeds to satisfy first execution; release of bond pro tanto.

### Article 7

#### Judicial Sales

#### PART 1

#### ADVERTISEMENT

- 9-13-140. How judicial sales advertised; description of property; advertisement and sale of livestock.
- 9-13-141. Timing of advertisements.
- 9-13-142. Requirements for official or-



Sec.		Sec.	
	gan of publication; designation where no journal or newspaper qualifies; how official organ changed; notice to Secretary of State.		Advertisement; notice; disposition of proceeds.
9-13-143.	Rates for legal advertisements.	9-13-165.	Sale of perishable property — Under tax executions.
9-13-144.	Alternate advertising when rates not agreed on.	9-13-166.	Form of tender.
9-13-145.	Advertising costs paid in advance; exception when affidavit of indigence filed.	9-13-167.	Purchaser to ascertain title and condition; under what conditions officer personally liable.
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9-13-160.	Time of conducting public sale.	9-13-170.	Liability for purchase money; officer's collection options.
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9-13-162.	Continuance of sale from day to day.	9-13-172.1.	"Eligible sale" defined; rescission of sale; damages.
9-13-163.	Sale of perishable property — When and by whom ordered; where held.	9-13-173.	Effect of judicial sale on title.
9-13-164.	Sale of perishable property —	9-13-174.	When sheriff's successor empowered to make titles.
		9-13-175.	Duty of officer to place purchaser in possession; which persons officer may dispossess.
		9-13-176.	How possession obtained after expiration of court term or replacement of officer.
		9-13-177.	Right to enforce covenants.
		9-13-178.	When title deeds prior to purchase must be proved.

**Cross references.** — Judgment liens generally, § 9-12-80 et seq. Attachment generally, T. 18, C. 3. Garnishment generally, T. 18, C. 4. Satisfaction of judgment

against real estate broker out of real estate education, research, and recovery fund, § 43-40-22. Tax executions, T. 48, C. 3.

JUDICIAL DECISIONS

**Writ of fieri facias and execution are synonymous** in the law of this state. Black v. Black, 245 Ga. 281, 264 S.E.2d 216 (1980).

**Executions are issued for purpose**

**of authorizing sheriffs and deputies to proceed with levy** on real and personal property. Black v. Black, 245 Ga. 281, 264 S.E.2d 216 (1980).



## ARTICLE 1

## GENERAL PROVISIONS

**Law reviews.** — For article, “Enforcing Commercial Real Estate Loan Guaranties,” see 15 (No. 2) Ga. State Bar J. 12 (2009).

### 9-13-1. Entry and signing of judgment prerequisite to execution.

No execution shall issue until judgment is entered and signed by the party in whose favor verdict was rendered or by his attorney, or by the presiding judge or justice. (Laws 1799, Cobb’s 1851 Digest, p. 494; Code 1863, § 3487; Code 1868, § 3510; Code 1873, § 3568; Code 1882, § 3568; Civil Code 1895, § 5339; Civil Code 1910, § 5934; Code 1933, § 39-102.)

**Law reviews.** — For note discussing constitutional issues affecting executions, and procedure for issuance and amendment of writ of execution, see 12 Ga. L. Rev. 814 (1978).

## JUDICIAL DECISIONS

**Judgment must be entered on verdict before lawful execution can issue.** Tanner v. Wilson, 184 Ga. 628, 192 S.E. 425 (1937).

It is essential that judgment be entered on a verdict within the time required and that an execution duly and properly issued and recorded, for a verdict in a money case, in itself, is not a lien upon any property of the defendant against whom a judgment is returned. Tanner v. Wilson, 184 Ga. 628, 192 S.E. 425 (1937).

**Execution not void when signature omitted.** — Though it is grossly irregular to issue execution upon a judgment entered up but not signed, neither the judgment nor the execution is to be held void. Pollard v. King, 62 Ga. 103 (1878).

**Judgment may be voidable.** — While a judgment may be amendable at a subsequent term and thus perfect the verdict, when it will not prejudice the rights of intermediate parties, ordinarily a judgment entered after the time provided by law is voidable, and during the intervening time the verdict is lifeless as to intermediate parties. Tanner v. Wilson, 184 Ga. 628, 192 S.E. 425 (1937).

**Judgment is amendable by court to**

**supply proper signature** nunc pro tunc. Pollard v. King, 62 Ga. 103 (1878).

**Execution should be issued in name of party** though the party may die before the execution is issued. Mims v. McKenzie, 22 Ga. App. 571, 96 S.E. 441 (1918).

**Death of party does not revoke power of the party’s attorney** to sign and enter judgment; it is a power conferred by law, and not by the client. Skidaway Shell-Road Co. v. Brooks, 77 Ga. 136 (1886).

**Clerk may not issue execution of own volition.** — Clerk of the superior court may issue execution at any time after a verdict is rendered and judgment entered thereon by this section; but there is no statutory provision imposing upon such a clerk the duty of issuing executions without express direction from the party or the party’s counsel. Broyles v. Young, 19 Ga. App. 294, 91 S.E. 437 (1917).

**Failure of clerk to properly issue and docket executions.** — Clerk of court is liable for failing or refusing to properly issue and docket executions after expressed direction by the party or the party’s attorney. Broyles v. Young, 19 Ga. App. 294, 91 S.E. 437 (1917).



**Cited** in *Dodd & Co. v. Glover*, 102 Ga. 82, 29 S.E. 158 (1897).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, §§ 5, 6, 54 et seq.  
**C.J.S.** — 33 C.J.S., Executions, § 22.

**ALR.** — Mere rendition, or formal entry or docketing, of judgment as prerequisite to issuance of valid execution thereon, 65 ALR2d 1162.

9-13-2. Execution suspended by appeal.

If execution is issued before the expiration of the time allowed for entering an appeal, the execution will be suspended on the entering of an appeal by either party. (Orig. Code 1863, § 3556; Code 1868, § 3579; Code 1873, § 3634; Code 1882, § 3634; Civil Code 1895, § 5415; Civil Code 1910, § 6020; Code 1933, § 39-115.)

JUDICIAL DECISIONS

**Supersedeas, during its pendency, prevents any steps to enforce judgment**, such as issuing an execution based thereon. *Tanner v. Wilson*, 184 Ga. 628, 192 S.E. 425 (1937); *Bank S. v. Roswell Jeep Eagle, Inc.*, 200 Ga. App. 489, 408 S.E.2d 503 (1991).  
**Execution is not void because is-**

**sued before expiration of time for appeal** after judgment. *Denton Bros. v. Hannah*, 12 Ga. App. 494, 77 S.E. 672 (1913).  
**Cited** in *Hancock v. Tifton Guano Co.*, 19 Ga. App. 185, 91 S.E. 246 (1917); *Mock v. Canterbury Realty Co.*, 152 Ga. App. 872, 264 S.E.2d 489 (1980).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 5 Am. Jur. 2d, Appellate Review, § 387.  
**C.J.S.** — 33 C.J.S., Executions, § 247 et seq.

**ALR.** — Effect of supersedeas or stay on antecedent levy, 90 ALR2d 483.

9-13-3. Execution to follow judgment.

Every execution shall follow the judgment upon which it issued and shall describe the parties thereto as described in the judgment. (Orig. Code 1863, § 3558; Code 1868, § 3581; Code 1873, § 3636; Code 1882, § 3636; Civil Code 1895, § 5417; Civil Code 1910, § 6022; Code 1933, § 39-104.)

**Law reviews.** — For note discussing the procedure for the issuance and amendment of a writ of execution, see 12 Ga. L. Rev. 814 (1978).

JUDICIAL DECISIONS

**Executions are presumed to conform to judgments.** *Jones v. McCleod*, 61 Ga. 602 (1878); *Hadden v. Larned*, 87 Ga. 634, 13 S.E. 806 (1891).



**Execution must follow judgment as to parties, amount, and other details.** If the execution fails to follow the judgment, the execution is illegal and, if amended, the levy falls. *Williams v. Atwood*, 57 Ga. 190 (1876).

**Variance must be material to be good ground of illegality** authorizing the execution quashed. *Reese v. Burts*, 39 Ga. 565 (1869); *Zachry v. Zachry*, 68 Ga. 158 (1881); *Moughon v. Brown*, 68 Ga. 207 (1881).

**Minor variance not fatal.** — When enough appears upon the face of the execution to connect the execution with the judgment, a variance will not vitiate the execution. *Smith v. Bell*, 107 Ga. 800, 33 S.E. 684, 73 Am. St. R. 151 (1899).

**Execution which fails to follow judgment is not admissible in evidence** over the objection of a claimant. *Bank of Tupelo v. Collier*, 191 Ga. 852, 14 S.E.2d 59 (1941).

**Generally, execution must describe parties thereto as described in judgment.** *Bank of Tupelo v. Collier*, 191 Ga. 852, 14 S.E.2d 59 (1941).

**Errors in names of parties.** — Misdescription of the party's name will not invalidate the execution. But an execution in favor of an entirely different person from the one named in the judgment as plaintiff is absolutely void. *Mitchell v. Toole*, 63 Ga. 93 (1879); *Powell v. Perry*, 63 Ga. 417 (1879); *Moughon v. Brown*, 68 Ga. 207 (1881); *Underwood v. Harvey*, 106 Ga. 268, 32 S.E. 124 (1898); *Smith v. Bell*, 107 Ga. 800, 33 S.E. 684, 73 Am. St. R. 151 (1899); *Osborne Bonding & Sur. Co. v. State*, 232 Ga. App. 11, 501 S.E.2d 264 (1998).

**Middle letter of name is immaterial unless** it is shown that there are two persons of the same first name and surname. *Hicks v. Riley*, 83 Ga. 332, 9 S.E. 771 (1889).

**Suffix of "Jr." to name is material when** there is another person of such name. *Manry v. Shepperd*, 57 Ga. 68 (1876).

**Variance of name of corporation is material.** *Bradford v. Water Lot Co.*, 58 Ga. 280 (1877).

**If judgment is against party in representative capacity,** execution must

follow the judgment. When the judgment is issued against a representative individually, the judgment is a material variance. *Horne v. Spivey*, 44 Ga. 616 (1872); *Horn v. Bird*, 45 Ga. 610 (1872).

**Property must be substantially described in same manner as in judgment.** *Napier v. Saulsbury, Respass & Co.*, 63 Ga. 477 (1879).

**Misstatement of date is immaterial** so long as the execution is otherwise connected with the judgment. *Ward v. Miller*, 143 Ga. 164, 84 S.E. 480 (1915).

**When party assumes cost by judgment,** execution levying costs is illegal. *Smith v. Lockett*, 73 Ga. 104 (1884).

**Judgment against firm is presumed good against firm and member of firm served.** Before a judgment could be obtained against the firm, it would be necessary that one of them be served, yet there is no presumption that any particular member of the firm was served. In this state, when any one member or the firm is served, the partnership is bound, but only the individual member who is served is bound. *Edmonds Shoe Co. v. Colson*, 41 Ga. App. 283, 152 S.E. 608 (1930).

**Judgment against copartnership** binds not only partnership property, but also individual property of each member of the partnership who has been served with the process; but the judgment does not bind, and execution issuing thereon cannot be levied on, the individual property of one not served. *Edmonds Shoe Co. v. Colson*, 41 Ga. App. 283, 152 S.E. 608 (1930).

**Interest must be specifically included in judgment.** — Claimant is not entitled to post-judgment interest on a judgment lien unless a provision for such interest is specifically included in the underlying judgment, and this is true in spite of a specific provision in the *fieri facias*. *Pettigrew v. Houston's Bldg. Materials & Supply Co. (In re Guevara)*, 67 Bankr. 982 (Bankr. N.D. Ga. 1986).

**Refusal of clerk to issue fieri facias with post-judgment interest when not so included in judgment.** — In performing the ministerial function of issuing executions, the clerk is required to follow the judgments of the superior court; thus, a clerk was not in error in refusing



to issue fi. fa. with an award of post-judgment interest when the judgment handed down by the court did not include such an award of interest. *Bowers v. Price*, 171 Ga. App. 516, 320 S.E.2d 211 (1984).

**No judgment lien shown.** — Trial court erred by granting summary judgment to a judgment lienholder because the lienholder did not establish as a matter of law that the lienholder had any legal or equitable interest in the property at any time after a quitclaim deed was executed; because the record did not es-

tablish that the lienholder had any ownership interest in the property upon which the right to seize assets could attach, the trial court erred in finding that the lienholder held a judgment lien against the property. *Wells Fargo Bank, N.A. v. Twenty Six Properties, LLC*, 325 Ga. App. 662, 754 S.E.2d 630 (2014).

**Cited** in *Saffold v. Banks*, 69 Ga. 289 (1882); *Stanfield v. Downing Co.*, 186 Ga. 568, 199 S.E. 113 (1938); *White v. Bowen*, 223 Ga. 94, 153 S.E.2d 706 (1967); *Leonard v. Leonard*, 236 Ga. 623, 225 S.E.2d 9 (1976).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, §§ 6, 54, 55.

**Am. Jur. Pleading and Practice Forms.** — 15A Am. Jur. Pleading and Practice Forms, Judgments, § 434.

**C.J.S.** — 33 C.J.S., Executions, § 14 et seq.

**ALR.** — Mere rendition, or formal entry or docketing, of judgment as prerequisite to issuance of valid execution thereon, 65 ALR2d 1162.

### 9-13-4. Judge may frame executions.

The judge of any superior court may frame and cause to be issued by the clerk thereof any writ of execution to carry into effect any lawful judgment or decree rendered in his court. (Orig. Code 1863, § 3561; Code 1868, § 3584; Code 1873, § 3639; Code 1882, § 3639; Civil Code 1895, § 5420; Civil Code 1910, § 6025; Code 1933, § 39-105.)

## JUDICIAL DECISIONS

**Writ should have been issued after revival of dormant judgment.** — In an action wherein a workers' compensation claimant had revived a lump-sum judgment of \$37,747.08 plus accrued interest, which had become dormant against an employer, the trial court properly refused to amend the 2006 judgment that revived it to provide for weekly disability payments as the term of court ended and, therefore, the trial court had no authority

to amend or alter that 2006 judgment. However, the trial court should have issued a writ of execution for the payments that became due after July 27, 2000, as those payments had not become dormant. *Taylor v. Peachbelt Props.*, 293 Ga. App. 335, 667 S.E.2d 117 (2008).

**Cited** in *Southern Express Co. v. Lynch*, 65 Ga. 240 (1880); *Dalenberg v. Dalenberg*, 325 Ga. App. 833, 755 S.E.2d 228 (2014).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 3.

**C.J.S.** — 33 C.J.S., Executions, § 14.



### 9-13-5. Amendment of execution — To conform to judgment or time of return.

A writ of fieri facias may be amended so as to conform to the judgment upon which it issued and to the time of its return; and such amendments shall in no manner affect the validity of the writ of fieri facias, nor shall the levy of the writ fall or be in any manner invalidated thereby. (Orig. Code 1863, § 3425; Code 1868, § 3445; Code 1873, § 3495; Code 1882, § 3495; Ga. L. 1890-91, p. 76, § 1; Civil Code 1895, § 5114; Civil Code 1910, § 5698; Code 1933, § 39-109.)

**Law reviews.** — For note discussing the procedure for the issuance and amendment of a writ of execution, see 12 Ga. L. Rev. 814 (1978).

### JUDICIAL DECISIONS

**Judgment may be amended by order of court, in conformity to verdict** upon which the judgment is predicated. *Jones v. Whitehead*, 167 Ga. 848, 146 S.E. 768 (1929).

**After proper order to amend, it is not requisite to issue new fieri facias.** *Saffold v. Wade*, 56 Ga. 174 (1876).

**Copy or alias fieri facias may be amended.** *Artope v. Barker*, 72 Ga. 186 (1883).

**Amendments to fieri facias relate back to original dates** and take effect therefrom. *Saffold v. Wade*, 56 Ga. 174 (1876).

**Execution on alimony judgment amendable to show proper status of party.** — When a judgment awarded alimony to a wife for the benefit of her minor

daughter, and execution in favor of the wife individually did not follow the judgment, the husband was entitled to have the judgment amended so as to show that the execution issued in the name of the wife for the benefit of her minor child, instead of in her individual capacity. *Jackson v. Jackson*, 204 Ga. 259, 49 S.E.2d 662 (1948).

**When excess penalty included in tax execution is illegal**, such excess requires only amendment; a dismissal of the execution for this reason is unauthorized. *State Revenue Comm'n v. NABISCO*, 49 Ga. App. 409, 175 S.E. 607 (1934).

**Cited in** *Hollis v. Sales*, 103 Ga. 75, 29 S.E. 482 (1897); *Manley v. McKenzie*, 128 Ga. 347, 57 S.E. 705 (1907); *Rabon v. Brown*, 275 Ga. 46, 561 S.E.2d 816 (2002).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 108 et seq.

**C.J.S.** — 33 C.J.S., Executions, §§ 114, 115.

**ALR.** — Power of court to compel officer to amend or perfect his return of execution or attachment, 132 ALR 904.

### 9-13-6. Amendment of execution — To conform to amended judgment.

Where a judgment has been amended by order of the court in conformity to the verdict upon which it is predicated and execution has previously issued thereon, the clerk of the court in which the judgment was rendered shall have power to amend the execution at any time so



as to make it conform to the amended judgment; and such amendment shall not cause any levy on the execution to fall. (Orig. Code 1863, § 3424; Code 1868, § 3444; Code 1873, § 3494; Code 1882, § 3494; Civil Code 1895, § 5113; Ga. L. 1902, p. 55, § 1; Civil Code 1910, § 5697; Code 1933, § 39-110.)

**Law reviews.** — For note discussing amendment of a writ of execution, see 12 the procedure for the issuance and Ga. L. Rev. 814 (1978).

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**Judgment amendable after execution issued.** — Judgment must conform to the reasonable intendment of the verdict upon which the judgment is based and the judgment may be amended by order of the court in order to conform to the verdict, even after execution has been issued. Frank E. Wood Co. v. Colson, 43 Ga. App. 265, 158 S.E. 533 (1931).  
**Cited** in Neely v. Mobley, 49 Ga. App. 541, 176 S.E. 527 (1934).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 108 et seq. **C.J.S.** — 33 C.J.S., Executions, §§ 114, 115.

9-13-7. Amendment of execution — To correct mistake in issuance; alias execution.

- (a) When the clerk of any court has made any mistake in issuing an execution, the clerk or any of his successors in office may correct the mistake by amending the execution and shall note and certify on the execution the fact that the amendment was made by him.
- (b) Alternatively, the clerk may issue an alias execution to be signed and dated by him at the time it is issued instead of the execution in which the mistake was made. The clerk shall note the fact of the issuing of the alias on the original, which original shall remain on file in his office, and shall likewise make a memorandum thereof on the execution docket; he shall also transcribe upon the alias all the entries and credits from the original. No order of court shall be necessary in the cases contemplated by this Code section. (Ga. L. 1869, p. 137, § 1; Code 1873, § 3496; Code 1882, § 3496; Civil Code 1895, § 5115; Civil Code 1910, § 5699; Code 1933, § 39-111.)

**Law reviews.** — For note discussing amendment of a writ of execution, see 12 the procedure for the issuance and Ga. L. Rev. 814 (1978).

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**When execution has been quashed because the execution was not conforming to the judgment,** the clerk may issue another which does conform to the



judgment. *Westbrook v. Hays*, 89 Ga. 101, 14 S.E. 879 (1892). See also *Smith v. Bell*, 107 Ga. 800, 33 S.E. 684, 73 Am. St. R. 151 (1899).

**Cited** in *Cooper v. Huff*, 55 Ga. 119 (1875); *Georgia Sec. Co. v. Sanders*, 74 Ga. App. 295, 39 S.E.2d 570 (1946).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 108 et seq.

**C.J.S.** — 33 C.J.S., Executions, §§ 114, 115.

### 9-13-8. Issuance of alias execution to replace lost original.

(a) When an execution which was regularly issued from a court is lost or destroyed, the judge or justice of the court from which the same was issued may at any time, upon proper application and proof of the facts by the affidavit of the applicant, his agent, or his attorney or by any other satisfactory proof, grant an order for the issuing of an alias execution in lieu of the lost original execution. The alias execution shall have all the legal force and effect of the lost or destroyed original execution.

(b) When an execution which was regularly issued by an officer of the state as authorized by law is lost or destroyed, the state officer or the successor to the state officer by whom the same was issued may at any time issue an alias execution in lieu of the lost original execution. The alias execution shall be dated the same date as the original execution and the officer shall endorse the word "alias" on the alias execution. The alias execution shall have all the legal force and effect of the lost or destroyed original execution.

(c) When an execution which was regularly issued by an officer of a county or local government as authorized by law is lost or destroyed, the judge of the probate court of the county in which the original execution was issued may issue an alias execution upon the filing by the party having the right to control the original execution of a statement under oath of the loss or destruction of such original execution. The judge shall endorse the word "alias" on the alias execution. The alias execution shall have all the legal force and effect of the lost or destroyed original execution. (Ga. L. 1857, p. 104, § 1; Code 1863, § 3892; Code 1868, § 3912; Code 1873, § 3988; Code 1882, § 3988; Civil Code 1895, § 4752; Civil Code 1910, § 5321; Code 1933, § 63-210; Ga. L. 1985, p. 1243, § 1.)

**Law reviews.** — For note discussing amendment of a writ of execution, see 12 the procedure for the issuance and Ga. L. Rev. 814 (1978).



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**Term “alias” is applied to execution issued in lieu of lost original.** *U-Driv-It Sys. v. Lyles*, 71 Ga. App. 70, 30 S.E.2d 111 (1944).

**Alias fieri facias is in effect a copy;** it would have no more force and effect than the original, and if the original was dormant and barred by the statute, so would the alias be. *U-Driv-It Sys. v. Lyles*, 71 Ga. App. 70, 30 S.E.2d 111 (1944).

**Alias execution not revivor of dormant judgment.** — If a judgment is dormant or dead, the issuance of an alias execution in lieu of the lost original execution which issued on the judgment does not revive the judgment. *U-Driv-It Sys. v. Lyles*, 71 Ga. App. 70, 30 S.E.2d 111 (1944).

**Alias fieri facias cannot regularly issue without order of court** for that purpose, which order should set forth all

the previous proceedings which had taken place under the original execution. *Watson v. Halsted, Taylor & Co.*, 9 Ga. 275 (1851).

**Notice to defendant** in a proceeding under this section is not necessary. *Rogers v. Petty*, 43 Ga. App. 771, 160 S.E. 128 (1931).

**Defendant may show payment of judgment before alias is issued.** *Lowry v. Richards*, 62 Ga. 370 (1879).

**Levy on land.** — Alias fieri facias can be legally levied on land belonging to the defendant, and a purchaser at a sheriff's sale under such fieri facias would be protected. *Ward v. Miller*, 143 Ga. 164, 84 S.E. 480 (1915).

**Cited** in *Torrent v. Sulter*, 67 Ga. 32 (1881); *Drawdy v. Littlefield*, 75 Ga. 215 (1885); *Land v. Gormley*, 177 Ga. 497, 170 S.E. 510 (1933).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 52 Am. Jur. 2d, Lost and Destroyed Instruments, § 7.

**C.J.S.** — 54 C.J.S., Lost Instruments, §§ 5, 8 et seq.

## 9-13-9. When execution returnable.

All executions, except as otherwise provided by this Code, shall be made returnable to the next term of the court from which they issued. (Orig. Code 1863, § 3557; Code 1868, § 3580; Code 1873, § 3635; Code 1882, § 3635; Civil Code 1895, § 5416; Civil Code 1910, § 6021; Code 1933, § 39-125.)

**Law reviews.** — For note discussing procedures required to effect a levy of execution, see 12 Ga. L. Rev. 814 (1978).

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**Meaning of “next term”.** — This section means that executions shall be returnable to the next term after the money can be lawfully made. *Chamberlin & Co. v. Beck, Gregg & Co.*, 68 Ga. 346 (1882).

**Section applicable to foreclosure of security interest.** — Former Code 1933, § 67-701 (see now O.C.G.A. § 44-14-230),

relating to the foreclosure of security interests, did not make provision for the execution to be returnable to any particular term of court, so former Code 1933, § 39-125 (see now O.C.G.A. § 9-13-9) would apply. *Youmans v. Consumers Fin. Corp.*, 77 Ga. App. 373, 48 S.E.2d 684 (1948).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 217 et seq.

**C.J.S.** — 33 C.J.S., Executions, §§ 511, 512.

**ALR.** — Execution: effect of return made after return day, 2 ALR 181.

Return on execution as subject to contradiction, explanation, or amplification, 129 ALR 1364.

### 9-13-10. Issuance of execution; to whom directed; on what property levied.

Except as otherwise provided by law, executions shall be issued by the clerk of the court in which judgment is obtained, shall bear teste in the name of the judge of such court, shall bear date from the time of their issuing, shall be directed "To all and singular the sheriffs of this state and their lawful deputies," and may be levied on all the estate of the defendant, both real and personal, which is subject to levy and sale. (Laws 1799, Cobb's 1851 Digest, p. 510; Code 1863, § 3553; Code 1868, § 3576; Code 1873, § 3632; Code 1882, § 3632; Civil Code 1895, § 5413; Civil Code 1910, § 6018; Code 1933, § 39-101.)

**Law reviews.** — For note discussing the procedure for the issuance and

amendment of a writ of execution, see 12 Ga. L. Rev. 814 (1978).

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**All executions must be signed by clerk or by the clerk's authority,** and if not so signed, the executions are void. A deputy may be authorized to issue executions but the deputy should not sign with the name of the clerk as if the clerk personally had done it. The clerk cannot by oral authority confer general power upon another to sign the clerk's name to executions issued in the clerk's absence and not under the clerk's immediate authority. *Battle v. Warren County Fertilizer Co.*, 155 Ga. 650, 118 S.E. 362 (1923).

**Execution must be levied by one of the officers to whom directed.** *Peeples v. Garrison & Son*, 141 Ga. 411, 81 S.E. 116 (1914).

**What property of debtor is subject to levy and sale.** — There is no general statute prescribing definitely what property of debtor is subject to levy and sale; this section providing simply that executions may be levied on all the estate, real and personal, subject to levy and sale. Common-law executions in this state usually order the levying officer to seize

enough of the goods and chattels, lands and tenements, of the debtor to make the sum due. *Rusk v. Hill*, 121 Ga. 379, 49 S.E. 261 (1904).

**Life estate is subject to levy and sale.** *First Nat'l Bank v. Geiger*, 61 Ga. App. 865, 7 S.E.2d 756 (1940).

**Vested remainder interest in land may be levied upon under execution,** although the life estate be not terminated; and since the greater includes the less, a levy upon a described tract or parcel of land is a levy upon the whole interest therein, including all vested remainder interests when such remainder interests exist. *Cox v. Hargrove*, 205 Ga. 12, 52 S.E.2d 312 (1949).

**Tax executions are "directed to all and singular the sheriffs and constables of this state."** The sheriff is the proper person to enforce such execution and, accordingly, to make a valid transfer thereof. *Beavers v. Interstate Bond Co.*, 189 Ga. 201, 6 S.E.2d 283 (1939).

**Cited in** *Tefft v. Sternberg*, 40 F. 2 (S.D. Ga. 1887); *Zugar v. Scarbrough*, 186 Ga.



310, 197 S.E. 854 (1938); *Shedden v. National Florence Crittenton Mission*, 191 Ga. 428, 12 S.E.2d 618 (1940); *Owen v. Cunningham*, 111 Ga. App. 399, 141 S.E.2d 912 (1965); *Riviera Equip., Inc. v.*

*Omega Equip. Corp.*, 147 Ga. App. 412, 249 S.E.2d 133 (1978); *Life Ins. Co. v. Dodgen*, 148 Ga. App. 725, 252 S.E.2d 629 (1979).

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**Writs of fieri facias issued by the magistrate court may be directed to the constables of that court** and, in executing these writs, constables may conduct judicial sales of personal property. 1984 Op. Att'y Gen. No. U84-36.

**Clerk's fees.** — Clerks of the superior

courts are entitled by Ga. L. 1972, p. 664 (see now O.C.G.A. § 15-6-77) to charge a fee of 50¢ (now \$1.00) for each fieri facias entered against each defendant on the general execution docket. 1976 Op. Att'y Gen. No. U76-51.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, §§ 47 et seq., 177 et seq.

**C.J.S.** — 33 C.J.S., Executions, § 27 et seq.

### 9-13-11. Direction, levy, service, and return of execution when sheriff a party.

All executions, orders, decrees, attachments for contempt, and final process issued by the clerks of the courts in favor of or against any sheriff shall be directed to the coroner of the county in which the sheriff resides and to all and singular the sheriffs of the state, except the sheriff of the county in which the interested sheriff resides, and may be levied, served, and returned by the coroner, other sheriff, or constable of the county at the option of the plaintiff or the party seeking the remedy. (Laws 1847, Cobb's 1851 Digest, p. 517; Code 1863, § 3554; Code 1868, § 3577; Code 1873, § 3633; Code 1882, § 3633; Civil Code 1895, § 5414; Civil Code 1910, § 6019; Code 1933, § 39-114.)

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**Object of this section is to prevent party from handling process against oneself.** *Gillis v. Smith*, 67 Ga. 446 (1881).

**Sheriffs are disqualified to perform official duties when the sheriffs have interest.** *Abrams v. Abrams*, 239 Ga. 866, 239 S.E.2d 33 (1977).

**When the sheriff is the defendant, the sheriff cannot levy against a co-defendant.** *State v. Jeter*, 60 Ga. 489 (1878).

**Sheriff may levy execution for costs** though the sheriff be interested. *Vining v.*

*Officers of Court*, 86 Ga. 127, 12 S.E. 298 (1890).

**Coroner is without authority to levy execution unless the execution is expressly directed to the coroner.** But if it does not appear on the face of the proceedings that the sheriff is disqualified to act, then, upon affidavit being made of the fact and placed in the hands of the clerk of the court issuing the process, and by the clerk delivered to the coroner, that officer is authorized to make the levy. *Blance & McGarough v. Mize*, 72 Ga. 96 (1883).



Cited in *Sanders v. State*, 151 Ga. App. 590, 260 S.E.2d 504 (1979).

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**This section does not give power to arrest sheriff in criminal matters;** it refers to the transfer of certain ministerial duties from a sheriff to the coroner, when the sheriff is a party to a proceeding, and precludes a sheriff handling an order for final process against the sheriff personally. 1973 Op. Att'y Gen. No. 73-93.

**This section applies to civil matters** involving orders, decrees, attachments, executions, and final processes, and does not give authority to arrest a sheriff in criminal matters. 1973 Op. Att'y Gen. No. 73-93.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 174 et seq.

**C.J.S.** — 33 C.J.S., Executions, §§ 89, 91.

### 9-13-12. Entry of levy on process.

The officer making a levy shall enter the same on the process by virtue of which levy is made and in the entry shall plainly describe the property levied on and the amount of the interest of defendant therein. (Orig. Code 1863, § 3569; Code 1868, § 3592; Code 1873, § 3640; Code 1882, § 3640; Civil Code 1895, § 5421; Civil Code 1910, § 6026; Code 1933, § 39-103.)

**Law reviews.** — For note discussing procedures required to effect a levy of execution, see 12 Ga. L. Rev. 814 (1978).

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**Entry of levy is officer's declaration that the officer has seized property** for the purpose of sale. *Head v. Lee*, 203 Ga. 191, 45 S.E.2d 666 (1947).

**Entry of levy should be signed** in order that it may be authenticated as the official act of the officer. *Jones v. Easley*, 53 Ga. 454 (1873).

**When entry is not signed, officer may amend the entry by adding the officer's signature.** *Sharp v. Kennedy*, 50 Ga. 208 (1873).

**Entry of levy may be made and levying officer's name signed by scrivener**, if done in the immediate presence and by the direction of the levying officer, and it will be upheld as the entry of

the officer. *Ellis v. Francis*, 9 Ga. 325 (1851); *Cox v. Montford*, 66 Ga. 62 (1880); *Weaver v. Wood*, 103 Ga. 88, 29 S.E. 594 (1897); *Vickers v. Hawkins*, 128 Ga. 794, 58 S.E. 44 (1907); *Cooney v. City of Atlanta*, 136 Ga. 118, 70 S.E. 950 (1911).

**When tax executions are levied by deputy sheriff**, entry of levy need not be signed by the sheriff or by someone legally authorized to sign the sheriff's name for the sheriff. *Durham v. Smith*, 186 Ga. 565, 198 S.E. 734 (1938).

**Interest intended to be seized and sold must be defined or specified in levy**, and not set out generally as an interest, or as the interest of the defendant in the property. *Bledsoe v.*



Willingham, 62 Ga. 550 (1879); Thornton v. Ferguson, 133 Ga. 825, 67 S.E. 97, 134 Am. St. R. 226 (1910).

**Levy must describe land with precision necessary to inform purchaser** of what the purchaser is buying and sufficient to enable the officer selling it to place the purchaser in possession; otherwise, it is void and a deed based thereon is likewise void. *Head v. Lee*, 203 Ga. 191, 45 S.E.2d 666 (1947); *Elliott v. Leathers*, 116 Ga. App. 842, 159 S.E.2d 167 (1967).

**Interest of defendant must be plainly set forth in entry of levy.** *Harden v. Bell*, 212 Ga. 711, 95 S.E.2d 375 (1956).

It is not sufficient that the entry recites that "the interest" or "all the interest" of the defendant in fieri facias is levied on, but it should disclose with reasonable certainty what that interest is. *Harden v. Bell*, 212 Ga. 711, 95 S.E.2d 375 (1956).

**Description in entry of levy is sufficient when** the description furnishes a key whereby the identity of the land may be made certain by extrinsic evidence. *Head v. Lee*, 203 Ga. 191, 45 S.E.2d 666 (1947); *Elliott v. Leathers*, 116 Ga. App. 842, 159 S.E.2d 167 (1967).

**When entry of levy is so indefinite that land cannot be accurately identified,** entry is void and cannot be cured by amendment. *Ansley v. Wilson*, 50 Ga. 418 (1873); *Burson v. Shields*, 160 Ga. 723, 129 S.E. 22 (1925).

Levy or a deed which fails to describe any particular land or to furnish any key to the confines of the land purporting to be levied on or to be conveyed is void. *Elliott v. Leathers*, 116 Ga. App. 842, 159 S.E.2d 167 (1967).

**Misdescription of land in levy.** — If there is misdescription in the levy, the levy is not void provided the land can be identified notwithstanding the description. The error or misdescription may be treated as surplusage. *Burson v. Shields*, 160 Ga. 723, 129 S.E. 22 (1925).

**Defect in levy description may be cured by amendment when** the entry describes the land seized with such particularity that there can be no doubt about its identity, and the defect in the entry refers to other matters than the description of the property seized, the defect may

be cured by amendment. *Perkerson v. Overby*, 59 Ga. 414 (1877); *Williams v. Baynes*, 84 Ga. 116, 10 S.E. 541 (1889); *Manley v. McKenzie*, 128 Ga. 347, 57 S.E. 705 (1907); *Dominey v. De Lang*, 130 Ga. 618, 61 S.E. 475 (1908).

**Improper description cannot be cured in deed made by sheriff** pursuant to sale under such levy. *Burson v. Shields*, 160 Ga. 723, 129 S.E. 22 (1925).

When a levy on land is void for lack of proper description, the defect cannot be cured by proper description of the land in the deed made by the sheriff in pursuance of the tax sale under the levy for the reason that the deed would not conform to entry of levy. *Craddock-Terry Co. v. Lazarus*, 180 Ga. 552, 179 S.E. 730 (1935).

**When levy upon land is made under court order directing sale of specific property,** levying officer has no discretion, but the officer's duty is to levy on the specific property to pay the judgment; nor would the officer be authorized in the seizure of any person's interest in the property except that of the defendant. *Heaton v. Hayes*, 188 Ga. 632, 4 S.E.2d 570 (1939).

**Supreme Court cannot say as matter of law that a deed is void** because based upon excessive levy, unless it appears upon the face of the deed that the levy was so grossly excessive as to be a fraud upon the law. *Head v. Lee*, 203 Ga. 191, 45 S.E.2d 666 (1947).

**Levy upon larger estate authorizes sale of lesser estate actually owned.** *Floyd v. Braswell*, 45 Ga. App. 726, 166 S.E. 65 (1932).

**Return of levying officer is sufficient prima facie** to establish who was in possession at time of levy, but such an entry is not sufficient to show that the claimant had never been in possession of the property under a previous conveyance. *Glenn v. Tankersley*, 187 Ga. 129, 200 S.E. 709 (1938), later appeal sub nom. *Bussell v. Glenn*, 197 Ga. 816, 30 S.E.2d 617 (1944).

**Notice of levy no substitute for valid writ of execution.** — When no valid levy occurs because of a defect in the writ of execution, the actual notice provided by the notice of levy issued pursuant to O.C.G.A. § 48-3-9 cannot serve as a



seizure of the property so as to cure the defect in the writ of execution. *Powers v. CDSaxton Props., LLC*, 285 Ga. 303, 676 S.E.2d 186 (2009).

**Entry reciting that land is levied on “as property of defendant,”** when there is only one defendant, is sufficient and will be construed as an assertion that the defendant in fieri facias is the owner in fee simple; but if there be more than one defendant named in the fieri facias such an entry would be too indefinite, and should go further and disclose either that the land is levied on as the common property of all the defendants, or as the individual property of one or more of them. *Clark v. C.T.H. Corp.*, 181 Ga. 710, 184 S.E. 592 (1936); *Harden v. Bell*, 212 Ga. 711, 95 S.E.2d 375 (1956).

**Description of land lot and acreage not void.** — Levy and the description contained in a deed based thereon which describes the land as being a definite number of acres located in a certain corner of a land lot which is in the form of a square with its lines running north and south, east and west, is not void for uncertainty. *Head v. Lee*, 203 Ga. 191, 45 S.E.2d 666 (1947).

**Execution levied upon “one-fifth undivided interest in” described tract of land** was not void because of an insufficient description of the property levied upon in that the amount of the interest of the defendant in the property was not set forth as required by this section and the fact that the undivided remainder interest of the defendant might be subject to a life estate in another person would not prevent the sale of whatever lesser interest the defendant actually had in the property under the levy. *Floyd v. Braswell*, 45 Ga. App. 726, 166 S.E. 65 (1932).

**Levy against property held by executrix failing to note representative capacity.** — Entry of levy by the officer upon an execution against specific property “only,” based on a judgment of foreclosure of a security deed, rendered against the executrix of the estate of the grantor (since deceased), is not void on the ground that the levy states that the property was levied upon as the property of the named executrix, rather than that the property was levied in the executrix’s rep-

resentative capacity. *Heaton v. Hayes*, 188 Ga. 632, 4 S.E.2d 570 (1939).

**Levy failing to specify buyer’s and seller’s respective interests in secured personalty.** — When the seller of personalty has a leviable interest in the property, notwithstanding it may be in the possession of the purchaser, and the creditor’s right is subject to the purchaser’s equity in the contract, if the property has been levied on under an execution against the seller, and the purchaser files a claim thereto, the levy cannot proceed and the property be subjected to sale thereunder when the amount due by the purchaser on the purchase money and the respective interests of the seller and the purchaser in the property do not appear on the entry of levy. *D.A. Schulte, Inc. v. Varron*, 181 Ga. 542, 182 S.E. 912, answer conformed to, 52 Ga. App. 683, 184 S.E. 356 (1935).

**Execution against land in proceedings in rem.** — When the proceeding and execution is one against the land itself, and not against any one person or persons or their interest therein, and the naming of a person in the execution as the owner of the property is only for the purpose of identification and further description of the land itself, and not the interest or title levied upon, the officer would be under no duty to levy on the property as the property of the person named in the execution, or to specify the officer’s interest in the property levied upon, and a recital in the entry of levy, which recital the officer was under no duty to make, that the property was levied on as the property of the person named in the execution, would not legally affect the extent of the levy or the extent of the title sold thereunder. *Clarke v. Mayor of Millen*, 187 Ga. 185, 200 S.E. 698 (1938).

**Constructive levy.** — Property tax sale was not void because the evidence established that the sheriff had effectuated a levy on the property, pursuant to O.C.G.A. § 9-13-12, prior to issuing the required notices, advertisements, and sale of the property; a constructive levy of the property was made by tacking the Notice of Execution and Tax Levy issued by the sheriff onto the property itself and the tacked notice also was issued to the tenant in possession and to the owner at the



address of record. *Tharp v. Vesta Holdings I, LLC*, 276 Ga. App. 901, 625 S.E.2d 46 (2005).

**Tax sale invalid.** — As a county tax commissioner's fieri facias on a parcel of property was defective because no entry of levy was made thereon as required by O.C.G.A. § 9-13-12, and the notice of levy issued under O.C.G.A. § 48-3-9 was not a substitute for a properly-executed fieri facias, the commissioner's subsequent tax sale of the property was invalid. *Powers v. CDSaxton Props., LLC*, 285 Ga. 303, 676 S.E.2d 186 (2009).

**Summary judgment properly denied.** — Special master did not err in finding that a fact question remained as to whether a proper levy of the property occurred in accordance with O.C.G.A. § 9-13-12 as deposition testimony from representatives of the sheriff's office

raised significant questions as to whether required entries of the levy, including the necessary description of the property, were appropriately made on the writ of execution, or fieri facias, and in the sheriff's records; on the other hand, however, the buyer presented a tax sale deed that recited that the formalities required for a levy had been honored, thereby providing evidence that some seizure of the property had occurred. *Davis v. Harpagon Co., LLC*, 281 Ga. 250, 637 S.E.2d 1 (2006).

**Cited in** *Wiley v. Martin*, 163 Ga. 381, 136 S.E. 151 (1926); *Speed Oil Co. v. Aldredge*, 192 Ga. 285, 15 S.E.2d 214 (1941); *Chastain v. Alford*, 193 Ga. 551, 19 S.E.2d 721 (1942); *Busey v. Milam*, 95 Ga. App. 198, 97 S.E.2d 533 (1957); *Davis v. Harpagon Co., LLC*, 283 Ga. 539, 661 S.E.2d 545 (2008).

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**Officer making levy shall enter same on tax fieri facias** and shall plainly describe property levied on; the officer making the levy can be a sheriff, or if there is a local Act making the tax

collector an ex officio sheriff for the purpose of levy and sale under tax execution, it can be the tax collector. 1969 Op. Att'y Gen. No. 69-250.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 196.

**C.J.S.** — 33 C.J.S., Executions, § 90.

### 9-13-13. Written notice of levy on land.

(a) In all cases of levying on land, written notice of the levy must be given personally or delivered by certified mail or statutory overnight delivery to the tenant in possession and to the defendant if not in possession.

(b) The officer levying on land under an execution, within five days thereafter, shall leave a written notice of the levy with the tenant in possession of the land, if any; and, if the defendant is not in possession, the officer shall also leave a written notice with the defendant if he is in the county or shall transmit the notice by mail to the defendant within the time aforesaid. (Laws 1808, Cobb's 1851 Digest, p. 509; Laws 1847, Cobb's 1851 Digest, p. 516; Code 1863, §§ 3572, 3573; Code 1868, §§ 3595, 3596; Code 1873, §§ 3643, 3644; Code 1882, §§ 3643, 3644; Civil Code 1895, §§ 5426, 5428; Civil Code 1910, §§ 6031, 6033; Code



1933, §§ 39-120, 39-122; Ga. L. 1990, p. 298, § 1; Ga. L. 2000, p. 1589, § 3.)

**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

**Law reviews.** — For note discussing procedures required to effect a levy of execution, see 12 Ga. L. Rev. 814 (1978).

## JUDICIAL DECISIONS

**Entry of levy need not specify that notice was given.** — Requirement of this section that notice of the levy shall be given to the tenant in possession within five days after the levy is made does not contemplate that the entry of levy must itself state that notice has been given in order to render the levy valid. *Keaton v. Farkas*, 136 Ga. 188, 70 S.E. 1110 (1911); *Hopson v. Stuart Lumber Co.*, 22 Ga. App. 392, 95 S.E. 1015 (1918).

**Failure to give notice required by this section** does not render levy ipso facto void. *Solomon v. Peters*, 37 Ga. 251, 92 Am. Dec. 69 (1867); *Cox v. Montford*, 66 Ga. 62 (1880).

**Failure to give notice does not invalidate sale or purchaser's title.** — This section requiring an officer to give the tenant in possession written notice of the levy is directory to the officer, and a failure to give such notice does not affect the title acquired by a bona fide purchaser of the property under such levy. If any injury is sustained by reason of such failure to give notice, it is a matter between the party injured and the officer making the levy and failing to give the notice. *Solomon v. Peters*, 37 Ga. 251, 92 Am. Dec. 69 (1867); *Clark v. C.T.H. Corp.*, 181 Ga. 710, 184 S.E. 592 (1936); *Haden v. Liberty Co.*, 183 Ga. 209, 188 S.E. 29 (1936); *Chastain v. Alford*, 193 Ga. 551, 19 S.E.2d 721, answer conformed to, 67 Ga. App. 316, 20 S.E.2d 150 (1942).

Provision of this section which requires that the defendant in execution or other person in possession of realty shall be given five days' notice of levy upon realty is merely directory, and not so essential as to avoid the levy, and affords no ground for

avoiding a sale had pursuant thereto. *Bibb County v. Elkan*, 184 Ga. 520, 192 S.E. 7 (1937); *Tanner v. Williamson*, 199 Ga. 216, 33 S.E.2d 694 (1945); *Edenfield v. State*, 80 Ga. App. 716, 57 S.E.2d 288 (1950).

**Particularly when no tenant in possession to receive notice.** — Requirements of this section are merely directory and failure to comply therewith will not void the levy, particularly if the petition discloses that there was no tenant in possession of the property, and that the plaintiff was not a resident of the county. *Sellers v. Johnson*, 207 Ga. 644, 63 S.E.2d 904 (1951).

**Suit for damages for noncompliance.** — Failure of officer to comply with this section may subject the officer to a suit for damages. *Payne v. Daniel*, 194 Ga. 549, 22 S.E.2d 47 (1942).

**Levy without notice insufficient to stop running of statute of limitations.** — When a levy upon real property has been made by simple entry upon the execution, and no notice of such levy has been given either to the defendant in fi. fa. or to the tenant in possession, as required by this section, such a levy would not be sufficient to stop the running of the statute in favor of the purchaser. *William P. Anderson & Co. v. Cheney*, 51 Ga. 372 (1874); *Kendall v. Westbrook*, 54 Ga. 587 (1875); *Zimmer v. Dansby*, 65 Ga. 89 (1880); *Rosser v. Georgia Pac. Ry.*, 102 Ga. 164, 29 S.E. 171 (1897).

**Cited in** *Smith v. Brown*, 96 Ga. 274, 23 S.E. 849 (1895); *Banks v. Giles*, 20 Ga. App. 97, 92 S.E. 651 (1917); *Wiley v. Martin*, 163 Ga. 381, 136 S.E. 151 (1926); *Small Equip. Co. v. Walker*, 129 Ga. App. 710, 200 S.E.2d 904 (1973).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 195 et seq.

**Am. Jur. Pleading and Practice**

**Forms.** — 9A Am. Jur. Pleading and Practice Forms, Executions, § 68.

**C.J.S.** — 33 C.J.S., Executions, §§ 78, 138 et seq., 164.

### 9-13-14. Bonds taken by executing officers valid; rights of plaintiffs not affected.

(a) All bonds taken by sheriffs or other executing officers from defendants in execution for the delivery of property, on the day of sale or any other time, which they may have levied on by virtue of any fi. fa. or other legal process from any court shall be good and valid in law and recoverable in any court having jurisdiction thereof.

(b) No bond taken in conformity with subsection (a) of this Code section shall in any case prejudice or affect the rights of the plaintiff in execution; the bond shall relate to and have effect solely between the officer to whom it is given and the defendant in execution. The officer shall in no case excuse himself for not having made the money on an execution by having taken the bond but shall be liable to be ruled as prescribed by law. (Laws 1829, Cobb's 1851 Digest, pp. 534, 535; Code 1863, §§ 3599, 3600; Code 1868, §§ 3623, 3624; Code 1873, §§ 3673, 3674; Code 1882, §§ 3673, 3674; Civil Code 1895, §§ 5436, 5437; Civil Code 1910, §§ 6041, 6042; Code 1933, §§ 39-302, 39-303.)

## JUDICIAL DECISIONS

**Levying officer leaving property in custody of defendant.** — This section is peculiarly applicable when the levying officer leaves property in the custody of the defendant, when no claim or affidavit of illegality is interposed. *Mullis v. Kennedy*, 143 Ga. 618, 85 S.E. 845 (1915).

**Bond creates agency relationship.** — Giving of forthcoming bond by the defendant in fi. fa. creates the relationship of an agency. *Roebuck v. Thornton*, 19 Ga. 149 (1855); *Smith v. Davis*, 3 Ga. App. 419, 60 S.E. 199 (1908); *Peacock Hdwe. Co. v. Allen*, 33 Ga. App. 654, 127 S.E. 780 (1925).

**Plaintiff may consent to taking of bond.** *Hand v. Brown*, 144 Ga. 272, 86 S.E. 1080 (1915).

**Obligor in forthcoming bond commits breach when** the obligor fails to deliver all property at the time and place of sale, or delivers the property in a dam-

aged condition. *Dickens v. Maxey*, 42 Ga. App. 783, 157 S.E. 368 (1931).

**After demand for property, sheriff may sue on bond**, without advertising the property for sale. *Hatton v. Brown*, 1 Ga. App. 747, 57 S.E. 1044 (1907).

**Plaintiff in execution may sell property if found**, though the bond is forfeited. *Chesapeake Guano Co. v. Wilder*, 85 Ga. 550, 11 S.E. 618 (1890).

**Action under this section is properly brought in name of sheriff** for the use of the plaintiff in fieri facias. *Hatton v. Brown*, 1 Ga. App. 747, 57 S.E. 1044 (1907).

**Plaintiff must show that there has been breach of bond** with resulting damage. *Grace v. Finleyson*, 10 Ga. App. 480, 73 S.E. 689 (1912); *Redwine Bros. v. Street*, 18 Ga. App. 77, 89 S.E. 163 (1916); *Arnold & Son v. Rhodes*, 26 Ga. App. 86, 105 S.E. 453, cert. denied, 26 Ga. App. 800



(1921). See also *Lane v. Johnson*, 22 Ga. App. 740, 97 S.E. 254 (1918).

**In action on forthcoming bond, no issue can properly be raised as to title to the property involved.** *O'Neill Mfg. Co. v. Harris*, 127 Ga. 640, 56 S.E. 739 (1907); *Hatton v. Brown*, 1 Ga. App. 747, 57 S.E. 1044 (1907); *Rowland v. Page*, 4 Ga. App. 269, 61 S.E. 148 (1908).

**Defendant cannot show that property was misdescribed in the bond.**

*Bowden v. Taylor*, 81 Ga. 199, 6 S.E. 277 (1888).

**Surety on bond cannot defend by showing fraudulent representations on the part of the levying officer.** *Rowland v. Page*, 4 Ga. App. 269, 61 S.E. 148 (1908).

**Cited in** *Moody v. Morgan*, 25 Ga. 381 (1858); *Wortsman v. Wade*, 77 Ga. 651 (1886); *Hobbs v. Taylor*, 13 Ga. App. 451, 79 S.E. 356 (1913); *Garmany v. Loach*, 34 Ga. App. 722, 131 S.E. 108 (1925).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 70 Am. Jur. 2d, Sheriffs, Police, and Constables, § 67 et seq.

**C.J.S.** — 33 C.J.S., Executions, § 192 et seq.

**ALR.** — Right of obligor in action on forthcoming bond or receipt for return of

property seized under process to set up title in himself, 37 ALR 1402.

Right of sheriff or constable to demand indemnity bond as a condition of executing process or seizure of property, absent claim by third person, 95 ALR 943.

### 9-13-15. Measure of damages on forthcoming bond.

Whenever personal property is levied upon under any judicial process from the courts of this state and a forthcoming bond is given for the same, the measure of damages to be recovered upon the bond shall be the value of the property at the time of its delivery under the bond, with interest thereon; and, if the property deteriorates in value by reason of being used by the person giving the bond or otherwise and is then delivered to the officer making the seizure, the officer or the plaintiff in execution may recover on the bond the difference between the value at the time of the delivery of the property under the bond and its value when turned over to the officer making the levy, with interest thereon. The amount of damages shall in no case exceed the amount due on the execution levied. (Ga. L. 1893, p. 123, § 1; Civil Code 1895, § 5438; Civil Code 1910, § 6043; Code 1933, § 39-304.)

## JUDICIAL DECISIONS

**Measure of damages for obligor's breach of bond.** — Measure of the obligee's damage by reason of the obligor's breach of the bond in delivering the property, at the time and place of sale, in a damaged condition is the difference between the value of the property at the time the obligor received the property under the bond and the bond's value when produced at the time and place of sale with interest thereon. *Dickens v. Maxey*, 42 Ga. App. 783, 157 S.E. 368 (1931).

**Property need not be sold to estab-**

**lish damages.** — In order to establish the obligee's damage for such breach, it is not necessary that the property actually produced, which is in a damaged condition, or is not all the property mentioned in the bond, be sold by the levying officer. *Dickens v. Maxey*, 42 Ga. App. 783, 157 S.E. 368 (1931).

**Effect of partial delivery.** — When the obligor delivers only a portion of the property at the time and place of sale, or delivers the property in a damaged condition, and the production and tender of the



property is not accepted by the levying officer as being a compliance with the condition of the bond, the obligee's damage may be established upon proof of the value of the property at the time of the property's delivery to the obligor under the bond and the property's value when produced at the time and place of sale. *Dickens v. Maxey*, 42 Ga. App. 783, 157 S.E. 368 (1931).

**No damage results when property delivered is worth more than enough** to satisfy execution. *Grace v. Finleyson*, 10 Ga. App. 480, 73 S.E. 689 (1912).

**Value of levied property is fixed by levying officer** in order to set the amount of the forthcoming bond and that amount is prima facie evidence of the value of the property as against the claimant. *Bearden v. GMAC*, 122 Ga. App. 180, 176 S.E.2d 652 (1970).

**Defendant in fieri facias is bound by agreed valuations in bond** for the specific properties. *Jones v. Donaldson*, 19 Ga. App. 705, 91 S.E. 1061 (1917).

**Surety may defensively plead that amount sought is not due.** — Surety may plead in defense to a suit on a bond that the amount sought to be recovered is not due because of a payment made by the surety on the indebtedness and not credited on the mortgage. *O'Quinn v. Patterson*, 42 Ga. App. 499, 156 S.E. 464 (1931).

**Cited in** *Brand v. Craig*, 84 Ga. 12, 10 S.E. 369 (1889); *Law v. Mullis*, 37 Ga. App. 329, 140 S.E. 430 (1927); *Manufacturers' Fin. Acceptance Corp. v. Bradley*, 50 Ga. App. 138, 177 S.E. 272 (1934); *Dampier v. Citizens & S. Nat'l Bank*, 129 Ga. App. 240, 199 S.E.2d 330 (1973).

RESEARCH REFERENCES

**C.J.S.** — 33 C.J.S., Executions, § 192 et seq.  
**ALR.** — Right of obligor in action on forthcoming bond or receipt for return of property seized under process to set up title in himself, 37 ALR 1402.

9-13-16. Penalty for fraudulent levy.

Any person who fraudulently causes any process, attachment, distress, or execution to be levied on any estrayed animal, lot of land, or other property, knowing that the same is not subject to the process or writ, shall, for the first offense, be guilty of a misdemeanor. For any subsequent conviction, the person shall be sentenced to confinement for not less than two nor more than four years. (Laws 1837, Cobb's 1851 Digest, pp. 849, 850; Code 1863, § 4333; Ga. L. 1865-66, p. 233, § 14; Code 1868, § 4369; Code 1873, § 4436; Code 1882, § 4436; Penal Code 1895, § 218; Penal Code 1910, § 215; Code 1933, § 39-9901.)

RESEARCH REFERENCES

**ALR.** — Recovery of damages for mental anguish, distress, suffering, or the like, in action for wrongful attachment, garnishment, sequestration, or execution, 83 ALR3d 598.

JUDICIAL DECISIONS

**Construction.** — Although O.C.G.A. § 9-13-16 could have possibly been read to apply to tax executions, it was impliedly repealed by the amendments to and the repeal of former O.C.G.A. § 48-3-19, and as a trial court apparently relied on a misinterpretation of the law in that area, a property owner's request for interlocu-



tory injunctive relief against the county tax commissioner's selling or transferring tax executions on the owner's property to third parties required remand for further determination; as former § 48-3-19 was the specific statute, the repeal thereof

meant that the general provisions of § 9-13-36 no longer guaranteed the rights therein. *E-Lane Pine Hills, LLC v. Ferdinand*, 277 Ga. App. 566, 627 S.E.2d 44 (2005).

## ARTICLE 2

### PARTIES IN EXECUTION

#### 9-13-30. Execution against sureties and endorsers.

When, in a judgment against sureties or endorsers on a draft, promissory note, or other instrument in writing, the plaintiff or his attorney has designated and identified the relation of the parties under the contract on which the judgment was rendered, execution shall issue accordingly. (Laws 1845, Cobb's 1851 Digest, p. 598; Laws 1850, Cobb's 1851 Digest, p. 600; Code 1863, § 3491; Code 1868, § 3514; Code 1873, § 3572; Code 1882, § 3572; Civil Code 1895, § 5343; Civil Code 1910, § 5938; Code 1933, § 39-107.)

### JUDICIAL DECISIONS

**Plaintiff or plaintiff's attorney must specify status of parties to promissory note.** — Former Code 1933, § 39-107 (see now O.C.G.A. § 9-13-30) placed the burden upon the plaintiff or the plaintiff's attorney in an action against a surety or an endorser on a promissory note to specify the status of the parties to the note. When this was not done, judgment and execution should be corrected under O.C.G.A. § 9-12-14. *Franklin v. Sea Island Bank*, 120 Ga. App. 654, 171 S.E.2d 866 (1969).

**Tax execution sale proper.** — Trial court properly granted summary judg-

ment to the purchaser of real estate in a quiet title action that involved the taxpayer's home and the taxpayer's failure to pay the property taxes on the property as the property was properly levied upon and no question of fact remained that the sheriff officially seized the property. Further, the affidavits of the civil process coordinator at the time of the tax sale, and the coordinator's successor, were properly admitted into evidence as such affidavits fell within the business records exception to the rule against hearsay. *Davis v. Harpagon Co., LLC*, 283 Ga. 539, 661 S.E.2d 545 (2008).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Suretyship, § 18 et seq.

**C.J.S.** — 33 C.J.S., Executions, §§ 101, 102.

#### 9-13-31. Execution against principal and his surety on appeal.

In all cases of appeal where security has been given and judgment has been entered against the principal and surety, jointly and severally, execution shall issue accordingly and shall proceed against either or both at the option of the plaintiff until his debt is satisfied. (Orig. Code



1863, § 3490; Code 1868, § 3513; Code 1873, § 3571; Code 1882, § 3571; Civil Code 1895, § 5342; Civil Code 1910, § 5937; Code 1933, § 39-106.)

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Suretyship, § 18 et seq.

**C.J.S.** — 72 C.J.S., Principal and Surety, § 265.

### 9-13-32. Execution following death of defendant.

On the death of a defendant after final judgment when no execution has been issued prior to such death, execution may issue as though the death had not taken place. (Orig. Code 1863, § 3370; Code 1868, § 3389; Ga. L. 1873, p. 21, § 1; Code 1873, § 3437; Code 1882, § 3437; Civil Code 1895, § 5034; Civil Code 1910, § 5616; Code 1933, § 3-419.)

### JUDICIAL DECISIONS

**This section changed common-law rule.** Smith v. Lockett, 73 Ga. 104 (1884); Mims v. McKenzie, 22 Ga. App. 571, 96 S.E. 441 (1918).

**Death of defendant after issuance of execution** will not prevent sale of property. Brooks v. Rooney, 11 Ga. 423 (1852); Hudgins v. McLain, 116 Ga. 273, 42 S.E. 489 (1902).

**Death of defendant will not prevent officer from making entry** of levy to prevent dormancy. Hatcher v. Lord, 115 Ga. 619, 41 S.E. 1007 (1902).

**Cited in** Pursley v. Manley, 166 Ga. 809, 144 S.E. 242 (1928).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 1 Am. Jur. 2d, Abatement, Survival, and Revival, § 57. 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 52.

**C.J.S.** — 1 C.J.S., Abatement and Revival, § 151. 33 C.J.S., Executions, § 71 et seq.

### 9-13-33. Executions using partnership name valid.

Executions issued in favor of or against partners, where the partnership style is used therein instead of the individual names of the persons composing the firm, shall be valid. (Orig. Code 1863, § 3495; Code 1868, § 3518; Code 1873, § 3576; Code 1882, § 3576; Civil Code 1895, § 5346; Civil Code 1910, § 5941; Code 1933, § 39-108.)

### RESEARCH REFERENCES

**C.J.S.** — 33 C.J.S., Executions, §§ 101, 102.



**9-13-34. Right to transfer execution; status of transferee.**

Any plaintiff in judgment or transferee may in good faith and for a valuable consideration transfer any execution to a third person. In all cases the transferee of any execution shall have the same rights and shall be subject to the same equities and the same defenses as was the original plaintiff in judgment. (Laws 1829, Cobb's 1851 Digest, p. 499; Code 1863, § 3516; Code 1868, § 3539; Code 1873, § 3597; Code 1882, § 3597; Civil Code 1895, § 5374; Civil Code 1910, § 5969; Code 1933, § 39-401.)

**JUDICIAL DECISIONS**

**Construction of section.** — Former Civil Code 1910, § 5969 (see now O.C.G.A. §§ 9-12-4 and 9-13-34) declare in express terms the same principles involved in former Civil Code 1910, §§ 4342 and 5670 (see now O.C.G.A. § 9-13-75). *Odom v. Attaway*, 173 Ga. 883, 162 S.E. 279 (1931).

**This section is silent as to any requirement of notice to person liable**, but provides simply that the transferee shall have the same rights and be liable to the same equities and subject to the same defenses as the original plaintiff in the judgment was. The equities protected, irrespective of notice, are equities between parties to the judgment and not those in favor of strangers to the judgment as to whose names and interest the record may be silent. *Sheffield v. Preacher*, 175 Ga. 719, 165 S.E. 742 (1932).

**Under the terms of this section, judgment may be transferred or assigned** any number of times, provided there was good faith, and in all cases when done in good faith the transferee shall have the same rights, be liable to the same equities, and subject to the same defenses as the original plaintiff in judgment was. *Odom v. Attaway*, 173 Ga. 883, 162 S.E. 279 (1931).

**Claim of judgment assignee is subject to equities and defenses** of judgment debtor at time of assignment, but is not subject to rights which did not then exist in favor of such judgment debtor and of which the judgment debtor did not become possessed until some time later as by the subsequent purchase of judgments

against the judgment creditor. Accordingly, a judgment which is held by an assignee is not subject to a set-off in favor of judgments existing against the assignor, but not acquired by the judgment debtor until after the assignment of the former judgment. *Sheffield v. Preacher*, 175 Ga. 719, 165 S.E. 742 (1932).

**Regardless of whether assignee took with knowledge thereof.** — Assignee of an execution takes the execution subject to any defense which the defendant might have set up against the original plaintiff, whether such assignee took with or without notice of the defense. *Echols v. Tower Credit Corp.*, 223 Ga. 307, 154 S.E.2d 617 (1967).

**If judgment and execution are void as to original judgment creditor**, they are void even though transferred and assigned to another for valuable consideration, and may be so held in a proper proceeding. *Winn v. Armour & Co.*, 184 Ga. 769, 193 S.E. 447 (1937).

**Transferee of original defendant may seek amendment to judgment.** — When the rights of an executrix of her husband's estate, as bona fide transferee of a judgment, are derivative of one of the original party defendants, the judgment is subject to amendment as between the parties. *Franklin v. Sea Island Bank*, 120 Ga. App. 654, 171 S.E.2d 866 (1969).

**Cited in** *Commercial Credit Co. v. Jones Motor Co.*, 46 Ga. App. 464, 167 S.E. 768 (1933); *Wilson v. Fulton Metal Bed Mfg. Co.*, 88 Ga. App. 884, 78 S.E.2d 360 (1953); *H-J Enters. v. Bennett*, 118 Ga. App. 179, 162 S.E.2d 838 (1968).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 8.

**C.J.S.** — 33 C.J.S., Executions, §§ 132, 133.

**9-13-35. Effect of transfer by attorney; ratification.**

The transfer of an execution by the attorney of record shall be good to pass the title thereto as against every person except the plaintiff in execution or his assignee without notice. Ratification by the plaintiff shall estop him also from denying the transfer. Receipt of the money from the transfer shall be such a ratification. (Orig. Code 1863, § 3517; Code 1868, § 3540; Code 1873, § 3598; Code 1882, § 3598; Civil Code 1895, § 5375; Civil Code 1910, § 5970; Code 1933, § 39-402.)

## RESEARCH REFERENCES

**C.J.S.** — 33 C.J.S., Executions, §§ 132, 133.

**9-13-36. Transfer of execution upon payment; status of transferee; recording necessary to preserve lien; exception for tax executions.**

(a) Except as otherwise provided for in subsection (b) of this Code section, whenever any person other than the person against whom the same has issued pays any execution, issued without the judgment of a court, under any law, the officer whose duty it is to enforce the execution, upon the request of the party paying the same, shall transfer the execution to the party. The transferee shall have the same rights as to enforcing the execution and priority of payment as might have been exercised or claimed before the transfer, provided that the transferee shall have the execution entered on the general execution docket of the superior court of the county in which the same was issued and, if the person against whom the same was issued resides in a different county, also in the county of such person's residence within 30 days from the transfer; in default thereof the execution shall lose its lien upon any property which has been transferred bona fide and for a valuable consideration before the recordation and without notice of the existence of the execution.

(b) This Code section shall not be applicable to tax executions. Tax executions shall be governed exclusively by Chapters 3 and 4 of Title 48. (Ga. L. 1872, p. 75, § 1; Code 1873, § 891a; Ga. L. 1875, p. 119, § 1; Code 1882, § 891a; Ga. L. 1894, p. 37, § 1; Civil Code 1895, § 888; Civil Code 1910, § 1145; Code 1933, § 39-403; Ga. L. 2006, p. 770, § 1/SB 585.)



**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2006, a comma was deleted following “execution” in the first sentence of subsection (a).

**Editor’s notes.** — Ga. L. 2006, p. 770, § 8/SB 585, not codified by the General Assembly, provides: “The provisions of

this Act shall apply to all executions transferred on or after July 1, 2006. Executions transferred prior to July 1, 2006, shall not be affected by this Act.”

**Law reviews.** — For annual survey of real property law, see 58 Mercer L. Rev. 367 (2006).

## JUDICIAL DECISIONS

**Words “any person,” as used in this section,** are sufficient to include purchaser at judicial sale had in pursuance of a judgment in favor of such purchaser on promissory notes executed by the taxpayer in the purchase of the land upon which the taxes subsequently accrued. *Graves v. Walker*, 182 Ga. 644, 186 S.E. 820 (1936).

**Main purpose and policy of this section** is to protect purchasers and others who might become interested after the date of the transfer. *National Bank v. Danforth*, 80 Ga. 55, 7 S.E. 546 (1887).

**Terms of this section must be strictly complied with.** *Clarke v. Douglass*, 86 Ga. 125, 12 S.E. 209 (1890).

**Who may transfer.** — Officer whose duty it is to enforce an execution issued without the judgment of a court has authority, as provided by this section, without the consent of the plaintiff in execution or the transferee thereof, to transfer

the execution to any person paying the amount of the execution and requesting a transfer. *Ledbetter Bros. v. Farrar*, 51 Ga. App. 742, 181 S.E. 591 (1935).

**Failure to record does not release lien as to defendant.** — Though the execution was not entered on the docket in the office of the clerk of the superior court within 30 days, the execution did not thereby lose its lien as against the defendant. *Fuller v. Dowdell*, 85 Ga. 463, 11 S.E. 773 (1890).

**Insufficient entry on execution docket.** — Entry not disclosing the names of the plaintiffs, but giving the transferee as plaintiff, and not indicating that the execution is for taxes, is insufficient to uphold the lien as against the defendant. *National Bank v. Danforth*, 80 Ga. 55, 7 S.E. 546 (1887).

**Cited in** *Ledbetter Bros. v. Farrar*, 51 Ga. App. 742, 181 S.E. 591 (1935); *Moore v. Heard*, 213 Ga. 711, 101 S.E.2d 92 (1957).

## RESEARCH REFERENCES

**C.J.S.** — 33 C.J.S., Executions, §§ 132, 133.

## ARTICLE 3

### PROPERTY AGAINST WHICH EXECUTION LEVIED

**Cross references.** — Exemption of school property from levy and sale, § 20-2-540. Homestead exemptions, T. 44, C. 13.

## RESEARCH REFERENCES

**ALR.** — Judgment lien or levy of execution on one joint tenant’s share or interest as severing joint tenancy, 51 ALR4th 906.



### 9-13-50. Designation by defendant of property to be levied on; when sheriff bound thereby.

(a) The defendant in execution shall be at liberty to point out what part of his property he may think proper to be levied on, which property the sheriff or other officer shall be bound to take and sell first if the same is, in the opinion of the levying officer, sufficient to satisfy the judgment and costs.

(b) When a defendant in execution shall point out property on which to levy the execution which is in the possession of a person not a party to the judgment from which the execution issued, the sheriff or other officer shall not levy thereon but shall proceed to levy on such property as may be found in the possession of the defendant. (Laws 1811, Cobb's 1851 Digest, p. 510; Code 1863, § 3570; Code 1868, § 3593; Code 1873, § 3641; Code 1882, § 3641; Civil Code 1895, § 5423; Civil Code 1910, § 6028; Code 1933, § 39-116.)

### JUDICIAL DECISIONS

**This section does not apply if tax executions are levied** upon the property of the defendant in fieri facias. *Boyd v. Wilson*, 86 Ga. 379, 12 S.E. 744, rehearing denied, 86 Ga. 385, 13 S.E. 428 (1890); *Davis v. Moore*, 154 Ga. 152, 113 S.E. 174 (1922); *McDaniel v. Thomas*, 162 Ga. 592, 133 S.E. 624 (1926); *City of Leesburg v. Forrester*, 59 Ga. App. 503, 1 S.E.2d 584 (1939).

**This section is not applicable when** the claimant points out property of the defendant to be levied on and sold. *City of Leesburg v. Forrester*, 59 Ga. App. 503, 1 S.E.2d 584 (1939).

**It is not essential to validity of levy that defendant point out property** to be levied upon. *L.R. Sams Co. v. Hardy*, 218 Ga. 147, 126 S.E.2d 661 (1962).

**When plaintiff may point out property.** — If the defendant does not point out property to be levied on, as the defendant may do under this section, the plaintiff may designate the property and this will serve as an indemnity to the sheriff. *Benson & Coleman v. Dyer*, 69 Ga. 190 (1882).

**Necessity of title to property pointed out.** — That the sheriff failed to levy on land pointed out by the defendant, to which the defendant did not have title, furnished no ground for an affidavit of

illegality. *Thompson v. Mitchell*, 73 Ga. 127 (1884).

**No illegality results when surety was not notified** nor given opportunity to point out property either in the surety's possession or in the possession of one of the principals in the judgment. *Mulling v. Bank of Cobbtown*, 36 Ga. App. 55, 135 S.E. 222 (1926).

**Noncompliance with section does not invalidate levy.** — This section gives the levying officer discretion as to the value of the property levied on. It is to be sufficient to satisfy the execution. But if the officer violates the officer's duty, either by making an excessive levy or by refusing to levy on the property pointed out by the defendant, the officer is liable for such special damages as the defendant may incur thereby; but this will be no valid objection to the process. *Benson & Coleman v. Dyer*, 69 Ga. 190 (1882); *Barfield v. Barfield*, 77 Ga. 83 (1886); *Hollinshed v. Woodard*, 124 Ga. 721, 52 S.E. 815 (1906); *Payne v. Daniel*, 194 Ga. 549, 22 S.E.2d 47 (1942).

**Cited in** *Douglas v. Singer Mfg. Co.*, 102 Ga. 560, 27 S.E. 664 (1897); *Long Realty Co. v. First Nat'l Bank*, 177 Ga. 440, 170 S.E. 485 (1933); *Shedden v. National Florence Crittenton Mission*, 191 Ga. 428, 12 S.E.2d 618 (1940).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 125.

**C.J.S.** — 33 C.J.S., Executions, § 138 et seq.

**ALR.** — Seat in chamber of commerce, board of trade, or stock exchange as subject of attachment, garnishment, or execution, 14 ALR 284.

Right of officer to break into building to levy under execution, 57 ALR 210.

Property of incompetent or infant under

guardianship as subject of execution, attachment, or garnishment, 92 ALR 919.

Money or other property taken from prisoner as subject of attachment, garnishment, or seizure under execution, 154 ALR 758.

Interest of vendee under executory contract as subject to execution, judgment lien, or attachment, 1 ALR2d 727.

Exemption of motor vehicle from seizure for debt, 37 ALR2d 714.

### 9-13-51. Sale of property subject to lien; order of application to payment.

Where property is subject to a lien and part of it is sold by the debtor, the part remaining shall be first applied to the payment of the lien. If the property subject to the lien is sold in several parcels at different times, the parcels shall be charged in the inverse order of their alienation. (Civil Code 1895, § 5424; Civil Code 1910, § 6029; Code 1933, § 39-118.)

**History of Code section.** — The language of this Code section is derived in

part from the decision in *Craigmiles v. Gamble*, 85 Ga. 439, 11 S.E. 838 (1890).

## JUDICIAL DECISIONS

**History of section.** — While it is stated that this section is a codification of *Craigmiles v. Gamble*, 85 Ga. 439, 11 S.E. 838 (1890), that case and the principle of this section are really based upon *Cumming v. Cumming*, 3 Ga. 460 (1847). *Powell v. Federal Land Bank*, 175 Ga. 732, 165 S.E. 817 (1932).

**Purpose of section.** — Principle upon which this section is based is that when one has purchased from another and paid value for property, so long as other property is owned by the grantor such property should on equitable principles be first applied to the payment of the debts of the grantor; and when liens exist on all of the property, that the lienors must make the money for which they have a lien out of the property owned by their grantor, before proceeding against that in the hands of the grantees for which the latter have paid value, thus making the debtor pay claims against the debtor out of the debt-

or's own property in preference to that belonging to others. *Merchants Nat'l Bank v. McWilliams*, 107 Ga. 532, 33 S.E. 860 (1899).

**This section applies to liens and not to debts.** — After property is sold, it is not subject to a debt existing at the time of sale unless the debt constitutes a lien. *Merchants Nat'l Bank v. McWilliams*, 107 Ga. 532, 33 S.E. 860 (1899).

**This section is applicable if tax liens accrue before security deeds are executed;** on the other hand, if the tax lien accrued after the security deeds were executed, the taxes are prorated. *Federal Land Bank v. Farmers' & Merchants' Bank*, 177 Ga. 505, 170 S.E. 504 (1933).

**This section is rule of contribution among purchasers,** and does not affect right of creditor to levy upon any of the parcels subject to the execution. Much less would it affect the right of the state and county to levy upon any of the parcels for



taxes. Decatur County Bldg. & Loan Ass'n v. Thigpen, 173 Ga. 363, 160 S.E. 387 (1931); City of Leesburg v. Forrester, 59 Ga. App. 503, 1 S.E.2d 584 (1939).

**This section is not applicable as between purchaser and lien creditor.**

— This section is restricted to the rights of the purchaser and the debtor as between themselves, and is applicable in all cases where their rights are to be settled. Hollinshed v. Woodard, 124 Ga. 721, 52 S.E. 815 (1906).

**When owner encumbers property with security deed and then leases the property.** — This section is not applicable to protect a lessee's interest when an owner encumbers property with a security deed and then leases the property, but by analogy the holder of the deed will be required to subject the other property of the debtor to protect the interests of the lessee. Western Union Tel. Co. v. Brown & Randolph Co., 154 Ga. 229, 114 S.E. 36 (1922).

**This section does not apply when it is alleged that tax sale was void** for the reason that the tax executions should have been levied on the property of the defendant in execution last conveyed by security deed. Bibb County v. Elkan, 184 Ga. 520, 192 S.E. 7 (1937).

**Property not "sold" when executory contract cancelled.** — Rescission or cancellation of an executory contract for the sale of land and the release of the purchaser from the payment of the purchase money due by the purchaser constitute an extinguishment of the contract of

sale and put an end to the contract, and such transaction does not amount to a sale or alienation of the property by the vendee in such contract, in the sense in which the words "sold" and "alienation" are used in this section. Planters Whse. Co. v. Simpson, 164 Ga. 190, 138 S.E. 55 (1927).

**Sale by sheriff under foreclosure of mortgage** is in law treated as sale by owner, and when such sale was of the last parcel of property sold, the owner being insolvent, that parcel of property is chargeable with the payment of all taxes due by the owner to the state and county at the time of the sale. Powell v. Federal Land Bank, 175 Ga. 732, 165 S.E. 817 (1932).

**Last property sold is primarily bound for payment of tax liens** when property is sold at different times to different purchasers, and taxes having a lien on all the property sold are due. Powell v. Federal Land Bank, 175 Ga. 732, 165 S.E. 817 (1932).

**Cited in** Columbia Trust & Realty Co. v. Alston, 163 Ga. 83, 135 S.E. 431 (1926); Phoenix Mut. Life Ins. Co. v. Bank of Kestler, 170 Ga. 734, 154 S.E. 247 (1930); Richards v. Schoen Inv. Co., 174 Ga. 909, 164 S.E. 756 (1932); Johnson v. Bank of Commerce, 176 Ga. 699, 168 S.E. 767 (1933); Harris Orchard Co. v. Tharpe, 177 Ga. 547, 170 S.E. 811 (1933); Federal Land Bank v. Moultrie Banking Co., 178 Ga. 150, 172 S.E. 455 (1934); Boswell v. Federal Land Bank, 181 Ga. 258, 182 S.E. 1 (1935); Thomas v. Hudson, 190 Ga. 622, 10 S.E.2d 396 (1940).

## RESEARCH REFERENCES

**ALR.** — Right of purchaser at judicial sale made subject to a purported lien to

question validity thereof, 75 ALR 1370; 171 ALR 302.

## 9-13-52. When sheriff may levy on and sell land outside county.

A sheriff or other levying officer shall not sell land outside the county in which he is sheriff or such officer except when the defendant in execution owns a tract or tracts of land divided by the line of the county of his residence, in which case the land may be sold in the county of his residence; if such tract of land is in a county other than that of the defendant's residence, it may be levied on and sold in either county. (Laws 1808, Cobb's 1851 Digest, p. 509; Laws 1847, Cobb's 1851 Digest,



p. 516; Code 1863, § 3573; Code 1868, § 3596; Code 1873, § 3644; Code 1882, § 3644; Civil Code 1895, § 5428; Civil Code 1910, § 6033; Code 1933, § 39-122.)

### JUDICIAL DECISIONS

**Meaning of "tract".** — Word "tract" in its common signification does not imply anything as to the size of the parcel of land. *Cade v. Larned*, 99 Ga. 588, 27 S.E. 166 (1896).

**Exception stated in this section was intended to apply** not only in cases where a land lot is divided by a county line, but where the county line is located exclusively upon original land-lot lines so long as the tract is divided by the county line. *Cade v. Larned*, 99 Ga. 588, 27 S.E. 166 (1896).

**Sheriff of county of residence may sell both tracts.** — When a tract of land is divided by the line of the county in which the defendant in execution resides, under the terms of this section, the whole

tract can be levied upon and sold as the defendant's property by the sheriff of that county, but not by the sheriff of the adjoining county. *Fambrough v. Amis ex rel. Fambrough*, 58 Ga. 519 (1877).

**Rule when new county organized.** — When a new county is organized and an execution is issued by the tax collector of the original county, for state and county taxes due in that county by one residing in the new county, it may be levied by the sheriff of the original county on land of the defendant in fi. fa., situated in the new county, and sold by such sheriff at the courthouse of the original county. *Stafford v. McDonald*, 154 Ga. 637, 115 S.E. 72 (1922).

### 9-13-53. When constable may levy on land; sale by sheriff.

No constable, except as provided by this Code, shall be authorized to levy on any real estate unless there is no personal property to be found sufficient to satisfy the debt or unless the real estate, being in the possession of the defendant, was pointed out by the defendant. In such event the constable is authorized to levy on such real estate, if in his county, and to deliver over the execution to the sheriff of the county a return of the property levied upon; and the sheriff shall proceed to advertise and sell the same as in case of levies made by himself. (Orig. Code 1863, § 3574; Code 1868, § 3597; Code 1873, § 3645; Code 1882, § 3645; Civil Code 1895, § 5429; Civil Code 1910, § 6034; Code 1933, § 39-121.)

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, §§ 125, 137, 138.

**Am. Jur. Pleading and Practice**

**Forms.** — 9A Am. Jur. Pleading and Practice Forms, Executions, § 100.

**C.J.S.** — 33 C.J.S., Executions, § 135.

### 9-13-54. When growing crop levied on and sold.

No sheriff or other officer shall levy on any growing crop of corn, wheat, oats, rye, rice, cotton, potatoes, or any other crop usually raised or cultivated by planters or farmers nor sell the same until the crop has



matured and is fit to be gathered. However, this Code section shall not prevent any levying officer from levying on and selling crops in cases where the defendant in execution absconds or removes himself from the county or state, or from selling growing crops with the land. (Laws 1836, Cobb's 1851 Digest, p. 514; Code 1863, § 3571; Code 1868, § 3594; Code 1873, § 3642; Code 1882, § 3642; Civil Code 1895, § 5425; Civil Code 1910, § 6030; Code 1933, § 39-119.)

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#### **Stage of maturity required for levy.**

— As to crops, such as cotton, which do not mature on the stalk at one time, but whose maturity is extended throughout the latter portion of the growing season, the rational construction of this section would be that the crop is subject to levy whenever it has reached that stage of maturity when it is ready for harvesting to commence. *Barnesville Bank v. Ingram*, 34 Ga. App. 269, 129 S.E. 112 (1925).

**Process is not deemed void merely because it cannot be immediately enforced** by levy upon growing crops, but is to be construed as authorizing and directing the levying officer to execute it when, and not before, a legal levy can be made thereunder. *Faircloth v. Webb*, 125 Ga. 230, 53 S.E. 592 (1906); *Hixon v. Callaway*, 2 Ga. App. 678, 58 S.E. 1120 (1907), later appeal, 5 Ga. App. 415, 63 S.E. 518 (1909).

**Fieri facias superior after maturity of crop to intervening lien.** — Lien of a judgment duly recorded on the general execution docket is, after the maturity of a growing crop of the defendant in fi. fa.,

superior to the title thereto obtained through a bill of sale to secure a debt, executed by the defendant in fi. fa. to a third person after the judgment is recorded, but before the crop is mature. *Hixon v. Callaway*, 2 Ga. 678, 58 S.E. 1120 (1907), later appeal, 5 Ga. App. 415, 63 S.E. 518 (1909).

**Grounds for levying on immature crop must appear in levy.** — By this section, immature crops cannot be levied on separately from the land on which the crops are growing, except if the debtor absconds or removes from the county or state. Such grounds for levying on growing crops, if grounds exist, should appear in the process or the levy; otherwise, the levy will be void. *Scott, Horton & Co. v. Russell*, 72 Ga. 35 (1883).

**Power of owner to sell.** — Although growing crops cannot be sold before maturity, growing crops may be sold by the owner before that time. *Hamilton v. State*, 94 Ga. 770, 21 S.E. 995 (1894).

**Cited in** *Courson v. Land*, 54 Ga. App. 534, 188 S.E. 360 (1936); *Bivins v. State*, 64 Ga. App. 689, 13 S.E.2d 874 (1941).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 140.

**C.J.S.** — 33 C.J.S., Executions, § 29 et seq.

**ALR.** — Judicial or execution sale of realty as affecting debtor's share in crops grown by tenant or cropper, 13 ALR 1425; 113 ALR 1355.

Right in respect of crops grown during period of redemption after judicial or execution sale, 66 ALR 1420.

Growing crops as subject to levy and seizure under attachment or execution, 103 ALR 464.



**9-13-55. Seizure prerequisite to sale of personalty.**

To authorize a sale of personal property there shall be an actual or constructive seizure. (Orig. Code 1863, § 2581; Code 1868, § 2583; Code 1873, § 2625; Code 1882, § 2625; Civil Code 1895, § 5452; Civil Code 1910, § 6057; Code 1933, § 39-1310.)

**JUDICIAL DECISIONS**

**Levy on personalty is made by actual or constructive seizure.** *Champion Box Co. v. Manatee Crate Co.*, 75 F.2d 340 (5th Cir. 1935).

**Officer must obtain custody and control of property** although an absolute seizure is not necessary. *Sheffield v. Key*, 14 Ga. 537 (1854); *Moore v. Brown*, *Bradbury & Catlett Furn. Co.*, 107 Ga. 139, 32 S.E. 835 (1899).

Officer making a levy must take control of the property. *Champion Box Co. v. Manatee Crate Co.*, 75 F.2d 340 (5th Cir. 1935).

**Officer must do some act for which the officer could be successfully prosecuted as trespasser**, if it were not for the protection afforded the officer by law. *Dean v. State*, 9 Ga. App. 303, 71 S.E. 597 (1911); *In re Brinn*, 262 F. 527 (N.D. Ga. 1919).

Officer must so deal with the property that the officer would be a trespasser but for the justification afforded by the officer's writ. *Champion Box Co. v. Manatee Crate Co.*, 75 F.2d 340 (5th Cir. 1935).

**As to machinery or articles difficult to transport**, there need be no carrying away in making a levy. *Champion Box Co. v. Manatee Crate Co.*, 75 F.2d 340 (5th Cir. 1935).

**Inventory of property or entry on writ sufficient when defendant acquiesces.** — If the officer making a levy goes where the property is and where the officer can control the property and does acts which indicate a levy, such as making an

inventory or entering a levy on the writ, and persons representing the defendant in *fi. fa.* in charge of the property are notified and acquiesce, the levy is sufficient though no manual custody is taken and the goods are not locked up or removed. *Champion Box Co. v. Manatee Crate Co.*, 75 F.2d 340 (5th Cir. 1935).

**Insufficient seizure.** — Sheriff's entry of levy describing property used for telephone system as switchboards and wires, lines, and instruments was not sufficient seizure. *In re Brinn*, 262 F. 527 (N.D. Ga. 1919).

**Constructive levy on lumber may be made when** defendant agrees to hold the property. *Myers v. Lee & Co.*, 22 Ga. App. 20, 95 S.E. 475 (1918).

**Levy on large drying machine.** — When marshal, in making levy on drying machine over 60 feet long and weighing 130,000 pounds, pasted a notice of levy on the machine, made an entry on the execution and left a copy of the levy with a company employee and one on the desk of the absent president of the company, who afterward found the notice there, there was a sufficient levy on the machine. *Champion Box Co. v. Manatee Crate Co.*, 75 F.2d 340 (5th Cir. 1935).

**Cited in** *Scott, Horton & Co. v. Russell*, 72 Ga. 35 (1883); *Green v. Coast Line R.R.*, 97 Ga. 15, 24 S.E. 814 (1895); *Keaton v. Farkas*, 136 Ga. 188, 70 S.E. 1110 (1911); *Ivey v. Gatlin*, 194 Ga. 27, 20 S.E.2d 592 (1942).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 385.

**C.J.S.** — 33 C.J.S., Executions, § 28 et seq.

**ALR.** — Levy upon or garnishment of



contents of safety deposit box, 19 ALR 863; 39 ALR 1215.

Leaving property in custody of debtor as

abandonment of levy under attachment or execution, 86 ALR 1412.

### 9-13-56. Future interests in personalty.

A future interest in personalty may not be seized and sold but the lien of judgments shall attach thereto so as to prevent alienation before the right to present possession accrues. (Orig. Code 1863, § 2581; Code 1868, § 2583; Code 1873, § 2625; Code 1882, § 2625; Civil Code 1895, § 5452; Civil Code 1910, § 6057; Code 1933, § 39-1310.)

### 9-13-57. Choses in action.

Choses in action are not liable to be seized and sold under execution, unless made so specially by statute. (Orig. Code 1863, § 3501; Code 1868, § 3524; Code 1873, § 3582; Code 1882, § 3582; Civil Code 1895, § 5353; Civil Code 1910, § 5948; Code 1933, § 39-113.)

## JUDICIAL DECISIONS

**Chose in action is immune from levy, unless made subject by statute.** Harvey v. Wright, 80 Ga. App. 232, 55 S.E.2d 835 (1949).

**Judgment creates no lien on choses in action** belonging to the defendant. Anderson v. Ashford & Co., 174 Ga. 660, 163 S.E. 741 (1932).

Judgment does not bind a chose in action; and the judgment would constitute no lien upon money in the possession of the defendant, or upon wages in the possession of a nonresident. Southland Loan & Inv. Co. v. Anderson, 178 Ga. 587, 173 S.E. 688 (1934).

Under Georgia law, a judgment creditor may not create a lien upon a debtor's chose in action except by way of summons of garnishment. Phillips & Jacobs, Inc. v. Color-Art, Inc., 553 F. Supp. 14 (N.D. Ga. 1982).

**Liens cannot be held to so attach to money or choses in action that the liens will prevent alienation by debtor** of that class of property before the suing out of a summons of garnishment, or some other collateral proceeding necessary to fix absolutely the lien of such judgment so as to remove the judgment from the personal dominion and control of the debtor. Carmichael Tile Co. v. Yaarab

Temple Bldg. Co., 177 Ga. 318, 170 S.E. 294 (1933).

**Bankruptcy debtor's pre-petition claim** constituted a chose-in-action against which a creditor's judgment lien did not attach because the creditor did not file a pre-petition garnishment action against it. Jankowski v. Dixie Power Sys. (In re Rose Marine, Inc.), 203 Bankr. 511 (Bankr. S.D. Ga. 1996).

**Garnishment proper means to reach debtor's choses in action.** — In order to reach the property of the debtor in choses in action, some other additional proceeding is necessary to fix the lien of such judgments. The fund must be reached either by process of garnishment, or by some collateral proceeding instituted for the purpose of impounding it, so that it can be applied in satisfaction of the judgment. Until it has been so seized by the courts for the purpose of appropriating it to the payment of the judgment, it is still subject to the dominion and control of the debtor, and the debtor may make a bona fide assignment or transfer of the fund in satisfaction of preexisting debts; and the person receiving it in pursuance of such transfer and assignment will take it freed from the general lien established by law in favor of a judgment creditor



against the property of the assignor. *Carmichael Tile Co. v. Yaarab Temple Bldg. Co.*, 177 Ga. 318, 170 S.E. 294 (1933).

**Stock in corporation is chose in action** and, in the absence of a statute, would not be subject to levy and sale under execution. *Atlas Supply Co. v. United States Fid. & Guar. Co.*, 126 Ga. App. 483, 191 S.E.2d 103 (1972).

**Promissory note standing alone is chose in action**, and the proper way to get a chose in action is by garnishment. *Kilgore v. Buice*, 229 Ga. 445, 192 S.E.2d 256 (1972).

**Promissory note secured by secu-**

**urity deed is not chose in action** in the sense of not being subject to seizure and sale under execution. *Kilgore v. Buice*, 229 Ga. 445, 192 S.E.2d 256 (1972).

**Indebtedness secured by security deed is property subject to lien** of properly recorded execution; and it can be seized and sold under execution. *Kilgore v. Buice*, 229 Ga. 445, 192 S.E.2d 256 (1972).

**Cited** in *Tow v. Evans*, 194 Ga. 160, 20 S.E.2d 922 (1942); *Summer v. Allison*, 127 Ga. App. 217, 193 S.E.2d 177 (1972); *Grossman v. Glass*, 239 Ga. 319, 236 S.E.2d 657 (1977); *JA-BE Distribs., Inc. v. Williford*, 152 Ga. App. 485, 263 S.E.2d 262 (1979).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 143.

**C.J.S.** — 33 C.J.S., Executions, § 35.

**ALR.** — Mortgagor or debtor's statutory right to redeem or his right to possession after foreclosure as subject of levy and seizure by creditors, 57 ALR 1128.

### 9-13-58. Corporation's disclosure of worth of defendant's shares mandated; refusal treated as contempt.

Upon demand by any sheriff, constable, or other levying officer having in his hands any execution against any person who is the owner of any shares of stock of a bank or corporation upon the president, superintendent, manager, or other officer having access to the books of the bank or corporation, the president, superintendent, manager, or other officer aforesaid shall disclose to the levying officer the number of shares and the par value thereof owned by the defendant in execution and, on refusal to do so, shall be considered in contempt of court and punished accordingly. (Laws 1822, Cobb's 1851 Digest, p. 511; Code 1863, § 2582; Code 1868, § 2584; Code 1873, § 2626; Code 1882, § 2626; Ga. L. 1890-91, p. 73, § 1; Ga. L. 1894, p. 45, § 1; Civil Code 1895, § 5430; Civil Code 1910, § 6035; Code 1933, § 39-123.)

### JUDICIAL DECISIONS

**Section changes common law.** — While stock in a corporation is a chose in action and, therefore, in the absence of a statute would not be subject to levy and sale under execution, it is specially made subject thereto by this section. *Tuttle v. Walton*, 1 Ga. 43 (1846); *McGehee v. Cherry*, 6 Ga. 550 (1849); *Ross v. Ross*, 25 Ga. 297 (1858); *Buena Vista Loan & Sav.*

*Bank v. Grier*, 114 Ga. 398, 40 S.E. 284 (1901); *Owens v. Atlanta Trust & Banking Co.*, 122 Ga. 521, 50 S.E. 379 (1905); *Tompkins v. American Land Co.*, 25 Ga. App. 326, 103 S.E. 190 (1920); *Fourth Nat'l Bank v. Swift & Co.*, 160 Ga. 372, 127 S.E. 729 (1925).

**Legislative intent to retain right to authorize levying on stock** is probably



implicit in this section. *Central of Ga. Ry. v. Little*, 126 Ga. App. 502, 191 S.E.2d 105 (1972).

**This section provides remedy by discovery in favor of ordinary creditor** without lien, if the creditor's debtor is subject to attachment and the creditor's shares to seizure thereunder. *Coca-Cola Co. v. City of Atlanta*, 152 Ga. 558, 110 S.E. 730, cert. denied, 259 U.S. 581, 42 S. Ct. 585, 66 L. Ed. 1074 (1922).

**Corporation with no office in state.** — This section does not apply to a corporation which has no office in this state. *Tow v. Evans*, 194 Ga. 160, 20 S.E.2d 922 (1942).

**Lien attaches under this section after levy and notice to corporation** and not upon judgment. Notice is necessary or

the levy will be subject to arrest on illegality. *Owens v. Atlanta Trust & Banking Co.*, 122 Ga. 521, 50 S.E. 379 (1905); *Weaver v. Tuten*, 144 Ga. 8, 85 S.E. 1048 (1915).

**Situs of stock for levy.** — It is clear that, for the purpose of subjecting corporate stock to attachment and execution, this section fixes its situs at the domicile of the corporation. *People's Nat'l Bank v. Cleveland*, 117 Ga. 908, 44 S.E. 20 (1903).

**Numbers of stock certificates are not required by this section to be furnished** to the levying officer. See *Stanton v. First Nat'l Bank*, 26 Ga. App. 257, 105 S.E. 726 (1921).

**Cited in** *Peoples Loan Co. v. Allen*, 199 Ga. 537, 34 S.E.2d 811 (1945).

### RESEARCH REFERENCES

**C.J.S.** — 33 C.J.S., Executions, § 39.

**ALR.** — Shares of corporate stock as subject of execution or attachment, 1 ALR 653.

Exclusiveness of statutory remedy of sale or forfeiture of stock to enforce liability for assessment, 83 ALR 892.

Power of equity court to reach or to sequester, for seizure and sale, beneficial equitable interests in corporate stock shares, 42 ALR2d 920.

### 9-13-59. What property liable to execution in action against joint contractors or partners when not all served.

Where, in an action against two or more joint contractors, joint and several contractors, or partners, service is perfected on only part of the contractors or partners and the officer serving the writ returns that the others are not to be found, the judgment obtained shall bind, and execution may be levied on, the joint or partnership property as well as the individual property, real and personal, of the defendant or defendants who have been served with a copy of the process. However, the judgment shall not bind nor shall execution be levied on the individual property of the defendant or defendants not served with process. (Laws 1820, Cobb's 1851 Digest, p. 485; Code 1863, §§ 3263, 3264; Code 1868, §§ 3274, 3275; Code 1873, §§ 3350, 3351; Code 1882, §§ 3350, 3351; Civil Code 1895, §§ 5009, 5010; Civil Code 1910, §§ 5591, 5592; Code 1933, § 39-117.)

### JUDICIAL DECISIONS

**This section changed common law.** (1852); *Raney v. McRae*, 14 Ga. 589 (1854); *Ross v. Executors of Everett*, 12 Ga. 30 (1852); *Ells v. Bone*, 71 Ga. 466 (1883); *Fincher &*



Womble v. Hanson, 12 Ga. App. 608, 77 S.E. 1068 (1913).

**History of section.** — Under common law, a judgment was regarded as an entity which must stand or fall in toto, but in 1820 the legislature modified this rule with reference to actions against joint contractors; this statute was codified in this section. Crowe v. Fisher, 104 Ga. App. 725, 122 S.E.2d 755 (1961).

**This section is exception to general rule** that a recovery against a joint obligor on a joint contract merges the cause of action. Almand v. Hathcock, 140 Ga. 26, 78 S.E. 345 (1913).

**This section assumes that judgment would bind all partners and assets** if former were served. Porter v. Johnson, 81 Ga. 254, 7 S.E. 317 (1888); Hidgon v. Williamson, 10 Ga. App. 376, 73 S.E. 528 (1912).

**This section permits joint provisors in same county to be joined.** Booher v. Worrill, 43 Ga. 587 (1871).

**Judgment in action against partnership, when one partner was served,** will bind assets of partnership and also the individual property of the

partner who was served with the suit. Ragan v. Smith, 178 Ga. 774, 174 S.E. 622 (1934); Grogan v. Herrington, 79 Ga. App. 505, 54 S.E.2d 284 (1949).

**Judgment need not be rendered expressly against served partners** in order to bind individual assets. Ragan v. Smith, 178 Ga. 774, 174 S.E. 622 (1934).

**Liability of unserved partner is not merged.** Ells v. Bone, 71 Ga. 466 (1883).

**Joint contractor who has been served is bound by judgment.** Kitchens v. Hutchins, 44 Ga. 620 (1872).

**Joint executors are joint contractors.** Wynn v. Booker, 26 Ga. 553 (1858).

**Cited in** Tedlie v. Dill, 2 Ga. 128 (1847); Dennis v. Green, 20 Ga. 386 (1856); Clayton & Webb v. May, 68 Ga. 27 (1881); Graham v. Marks, 95 Ga. 38, 21 S.E. 986 (1894); Warren Brick Co. v. Lagarde Lime & Stone Co., 12 Ga. App. 58, 76 S.E. 761 (1912); Denton Bros. v. Hannah, 12 Ga. App. 494, 77 S.E. 672 (1913); Ragan v. Smith, 49 Ga. App. 118, 174 S.E. 180 (1934); Dillingham v. Cantrell, 54 Ga. App. 622, 188 S.E. 605 (1936); Rogers v. Carmichael, 184 Ga. 496, 192 S.E. 39 (1937); Williams Bros. Lumber Co. v. Anderson, 210 Ga. 198, 78 S.E.2d 612 (1953).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, §§ 120, 211.

**C.J.S.** — 33 C.J.S., Executions, §§ 9, 45.

**ALR.** — Survival of liability on joint obligation, 67 ALR 608.

Right to judgment, levy, or lien against

individual in action under statute permitting persons associated in business under a common name to be sued in that name, 100 ALR 997.

Obligation of owners who unite in contract relating to property which they own in severalty, as joint, several, or joint and several, 122 ALR 1336.

## 9-13-60. Taking up of debt to give defendant legal title to property; notice of levy and sale; application of proceeds.

(a) Where any person other than the vendor or other than the holder or assignee of the purchase money or secured debt has a judgment against a defendant in execution who does not hold legal title to property but has an interest or equity therein, such plaintiff in execution may take up the debt necessary to be paid by the defendant in order to give the defendant legal title to the property by paying the debt with interest to date if due and interest to maturity if not due; and thereupon a conveyance to the defendant in execution or, if he is dead,



to his executor or administrator shall be made by the vendor or holder of title given to secure the debt or, if dead, by the executor or administrator thereof. When the conveyance has been filed and recorded, the property may be levied on and sold as property of the defendant.

(b) In all cases provided for in subsection (a) of this Code section, notice of the levy and time of sale shall be given by the levying officer to the vendor or holder of the title given to secure the debt, if known, and also to the defendant in execution and, in case of death, to their legal representatives. Depositing a properly addressed and stamped letter into the United States mail shall be deemed sufficient notice under this subsection.

(c) The proceeds of the sale shall be applied first to the payment of liens superior to the claims taken up by the plaintiff in execution, next to the payment of principal advanced by the plaintiff in execution to put title in defendant, with interest to date of sale, and the balance to the execution under which the property was sold, and to other liens according to priority, to be determined as provided by law. (Laws 1847, Cobb's 1851 Digest, p. 517; Laws 1850, Cobb's 1851 Digest, p. 518; Code 1863, § 3581; Ga. L. 1868, p. 16, § 1; Code 1868, § 3604; Code 1873, § 3654; Ga. L. 1877, p. 21, § 1; Code 1882, § 3654; Ga. L. 1894, p. 100, §§ 2, 3; Civil Code 1895, §§ 5433, 5434; Civil Code 1910, §§ 6038, 6039; Code 1933, §§ 39-201, 39-202.)

**Law reviews.** — For article, "Remedies of Judgment Creditor Against Land Conveyed by Security Deed," see 8 Ga. B.J. 61 (1945).

For note discussing procedures required to effect a levy of execution, see 12 Ga. L. Rev. 814 (1978).

## JUDICIAL DECISIONS

**This section was intended to prescribe remedy for judgment creditors** in cases where the legal title to property of which the debtor is otherwise the owner has been reserved or conveyed to secure debt, and for this reason is not subject to levy. *Cook v. Securities Inv. Co.*, 184 Ga. 544, 192 S.E. 179 (1937).

**This section provides remedy for judgment creditor** when land is conveyed by a deed to secure a debt, and the debtor has no other property except the debtor's equity in the land. The remedy of another creditor who subsequently obtains a judgment against the debtor is to redeem the land or otherwise proceed ac-

cording to this section. *Cook v. Securities Inv. Co.*, 184 Ga. 544, 192 S.E. 179 (1937).

**This section relates to payment of secured debt by holder of judgment** (a stranger to the security deed) against the grantor before the land can be subjected to the judgment last referred to. *Coley v. Altamaha Fertilizer Co.*, 147 Ga. 150, 93 S.E. 90 (1917).

**Judgment holder levying against defendant with only equitable interest.** — This section applies when the holder of the judgment levies against the defendant with only an equitable interest in the property. *Gamble v. Pilcher*, 242 Ga. 556, 250 S.E.2d 416 (1978).



**This section has been applied to attachment cases before judgment.** *Jones v. Andrews*, 89 Ga. App. 734, 81 S.E.2d 304, aff'd, 210 Ga. 706, 82 S.E.2d 503 (1954).

**O.C.G.A. § 9-13-60 had no application when the defendant had unencumbered legal title** to a one-half undivided interest in a tenancy in common to the 5.211 acres sought to be levied upon by the sheriff since the statute applies only to defendants possessed of only equitable interest in the property. *Glover v. Ware*, 236 Ga. App. 40, 510 S.E.2d 895 (1999).

**Statutory conditions mandatory.** — Right to redeem and subject property to execution must be exercised upon statutory conditions as imposed in this section. *Dedge v. Bennett*, 138 Ga. 787, 76 S.E. 52 (1912).

**Only leviable interest in property is legal title in defendant in fieri facias.** — Levying on anything short of a legal title in the defendant in fi. fa., barring only some fatal defect in the claimant's case, is a nullity. *Manchester Motors, Inc. v. F & M Bank*, 91 Ga. App. 811, 87 S.E.2d 342 (1955).

**Security deed passes legal title to grantee-creditor;** thus, leaving no leviable interest in the property in the grantors. *Dean v. Andrews*, 236 Ga. 643, 225 S.E.2d 38 (1976).

**Security deed grantor's leviable interest in land.** — Grantor in security deed has no leviable interest in land thereby conveyed until judgment creditor redeems the land by payment to the grantee of the full amount of the secured debt. *Shumate v. McLendon*, 120 Ga. 396, 48 S.E. 10 (1904); *Virginia-Carolina Chem. Co. v. Williams*, 146 Ga. 482, 91 S.E. 543 (1917); *First Nat'l Bank v. McFarlin*, 146 Ga. 717, 92 S.E. 69 (1917); *Miles v. Waters*, 47 Ga. App. 25, 169 S.E. 783 (1933).

**Priority is not a relevant issue in determining compliance with O.C.G.A. § 9-13-60.** *Harris v. Pullen* (In re Pullen), 414 B.R. 871 (Bankr. N.D. Ga. 2009).

**Levy improper until secured debt redeemed.** — Under this section, the property at the time of the levy was not subject to levy and sale by the plaintiff in

execution until the plaintiff paid off the note in which title to the property had been previously reserved. *Black v. Gate City Coffin Co.*, 115 Ga. 15, 41 S.E. 259 (1902); *R.L. Deariso & Co. v. Lawrence*, 3 Ga. App. 580, 60 S.E. 330 (1908).

Judgment creditor cannot enforce the creditor's judgment by levy and sale of the property embraced in the security deed without redemption. Ordinarily, the creditor must first pay in full the secured debt, procure the vendee in the security deed to reconvey the property thereby conveyed to the vendor, have the deed of reconveyance recorded, and then proceed to levy and sell. *Kidd v. Kidd*, 158 Ga. 546, 124 S.E. 45 (1924).

Judgment creditor cannot levy an execution on land conveyed by a prior security deed, without first redeeming the land and proceeding otherwise as required by this section. *Moncrief Furnace Co. v. Northwest Atlanta Bank*, 193 Ga. 440, 19 S.E.2d 155 (1942); *Perry v. Heflin*, 202 Ga. 143, 42 S.E.2d 378 (1947).

When the defendant in execution does not hold legal title to property but has only an equity therein, an execution may not be levied against such equity until after payment or tender of any amounts owing to the vendor under the retention title contract. *Pethel v. Liberal Fin. Co.*, 86 Ga. App. 773, 72 S.E.2d 563 (1952).

In order for a creditor to have an execution levied upon property covered by a valid bill of sale to secure debt, such creditor must first redeem the property by paying the debt, and a levy on the property covered by the bill of sale without compliance with such provision is void. *Jones v. Andrews*, 210 Ga. 706, 82 S.E.2d 503 (1954); *Manchester Motors, Inc. v. F & M Bank*, 91 Ga. App. 811, 87 S.E.2d 342 (1955).

**Levy made before deed of reconveyance is void.** — *National Bank v. Danforth*, 80 Ga. 55, 7 S.E. 546 (1887); *McCalla v. American Freehold Land Mtg. Co.*, 90 Ga. 113, 15 S.E. 687 (1892); *Rogers v. Smith*, 98 Ga. 788, 25 S.E. 753 (1896); *Shumate v. McLendon*, 120 Ga. 396, 48 S.E. 10 (1904); *Dedge v. Bennett*, 138 Ga. 787, 76 S.E. 52 (1912); *Virginia-Carolina Chem. Co. v. Williams*, 146 Ga. 482, 91 S.E. 543 (1917); *Bank of La Grange v.*



Rutland, 27 Ga. App. 442, 108 S.E. 821 (1921), later appeal, 29 Ga. App. 478, 116 S.E. 49 (1923); Kidd v. Kidd, 158 Ga. 546, 124 S.E. 45 (1924); Citizens Mercantile Co. v. Easom, 158 Ga. 604, 123 S.E. 883 (1924).

When a judgment creditor paid off a debtors' security deed, a levy and sale of the debtor husband's one-half undivided interest in the property was void because the property was not reconveyed to the husband since, upon paying off the first deed, the creditor did not obtain a cancellation of the deed, and did not, after obtaining the assignment from the mortgage services company, execute a quitclaim for levy and sale. *Harris v. Pullen* (In re Pullen), 414 B.R. 871 (Bankr. N.D. Ga. 2009).

**Levy properly dismissed when requirements of section not met.** — When debt due under conditional-sale contract which took precedence over attachment levy had not been paid, and no tender thereof had been made by the plaintiff in attachment, it was not error to direct a verdict dismissing the levy on the ground that there had been no compliance with this section. *Jones v. Andrews*, 89 Ga. App. 734, 81 S.E.2d 304, aff'd, 210 Ga. 706, 82 S.E.2d 503 (1954).

**When judgment creditor must satisfy indebtedness on property.** — Judgment creditor must satisfy any indebtedness on property in which the judgment debtor has an equitable interest prior to levy and sale; except when the existing indebtedness on the property is assumable and there is a wide disparity between the interest rate payable on such indebtedness and the interest rate at which any subsequent sale of the property would have to be financed. *Hampton v. Gwinnett Bank & Trust Co.*, 251 Ga. 181, 304 S.E.2d 63 (1983).

To collect on a judgment against a person with only an equitable interest in property, a creditor must satisfy any outstanding debt on the property prior to a levy and sale. Equity will not create an exception to this general rule unless peculiar facts are shown that make the legal remedy inadequate. *Dime Savs. Bank v. Sandy Springs Assocs.*, 261 Ga. 485, 405 S.E.2d 491 (1991).

**Requirements of section not relaxed by equity absent good cause.** — Equity will not aid a judgment creditor in subjecting to the creditor's lien the property conveyed by security deed so as to authorize a relaxation of the general rule of this section, unless peculiar facts are shown, involving established equitable principles, such as would render the remedy at law under the statute inadequate, and would authorize a grant of the equitable relief prayed. *Moncrief Furnace Co. v. Northwest Atlanta Bank*, 193 Ga. 440, 19 S.E.2d 155 (1942); *Perry v. Heflin*, 202 Ga. 143, 42 S.E.2d 378 (1947).

**Financial inability of judgment creditor to purchase secured debt cause for equitable relief.** — Financial inability of the judgment creditor to pay an outstanding and prior lien created by a security deed, and that the judgment debtor has no other property subject to levy and sale, are such peculiar facts as will authorize a relaxation of the general rule and the granting of equitable relief. *Perry v. Heflin*, 202 Ga. 143, 42 S.E.2d 378 (1947).

**Substantial loss to creditor by redemption also cause.** — When a debt secured by a deed to secure the debt is interest bearing and not due, and a redemption under this section will cause the judgment creditor to lose a substantial sum approximating the amount of the unearned interest, the debtor having no other property from which to satisfy the judgment, a subsequent judgment creditor may proceed in equity for the appointment of a receiver for the purpose of selling the property subject to the principal of the debt and accrued interest. *Cook v. Securities Inv. Co.*, 184 Ga. 544, 192 S.E. 179 (1937).

**When holder of judgment pays debt secured by deed, it is duty of grantee to convey property** embraced therein to the defendant in fieri facias; and when such conveyance is made and recorded, such property may be levied upon and sold as the property of the defendant. *Carlton v. Reeves*, 157 Ga. 602, 122 S.E. 320 (1924).

**Full payment of secured debt by grantor revests title without reconveyance.** — Payment of a debt secured by



deed to land revests in the grantor of such deed such interest and title therein as can be levied upon under an execution issuing upon a judgment junior in date to such deed, without a reconveyance of the land to the grantor, as required in this section, and, in case of cancellation, without the record of the cancellation of security deed. *Citizens Mercantile Co. v. Easom*, 158 Ga. 604, 123 S.E. 883 (1924).

**Sale prevented if defendant tenders debt and costs to judgment creditor.** — When a plaintiff holding a fieri facias as transferee desires to levy it upon land, if the defendant in fi. fa. then tenders the plaintiff the full amount of the principal, interest, and costs due on the fi. fa., it is the plaintiff's duty to accept the payment; and if the plaintiff declines to accept such tender, and undertakes to have the property sold, injunction will lie to prevent the sale. *Flemister Grocery Co. v. Burtz*, 147 Ga. 416, 94 S.E. 229 (1917).

**Security deed must be satisfied before materialman's lien enforced.** — After a plaintiff materialman has obtained a lien against the property and a judgment against the contractor who used the materials, and the judgment has not been satisfied, that plaintiff is entitled to obtain a judgment foreclosing the lien, but cannot enforce the lien by levy and sale until any prior security deed is satisfied. *Bowen v. Kicklighter*, 124 Ga. App. 82, 183 S.E.2d 10 (1971).

If a materialman who has obtained a lien against the property and a judgment against the contractor properly tenders the amount due on a prior security deed to the holder of that deed, the holder is bound to accept it, cancel the security deed, and allow the materialman to proceed under its foreclosure. *Bowen v. Kicklighter*, 124 Ga. App. 82, 183 S.E.2d 10 (1971).

**Interest of obligee in bond for title** is not subject to levy without first tendering amount due upon purchase money. *Shumate v. McLendon*, 120 Ga. 396, 48 S.E. 10 (1904); *Burkhalter v. Durden*, 122 Ga. 427, 50 S.E. 144 (1905); *Protestant Episcopal Church v. Lowe Co.*, 131 Ga. 666, 63 S.E. 136 (1908).

**Conveyance by executors of deceased partner sufficient.** — When the

executors of a deceased partner acquire the whole interest in a promissory note payable to the partnership for land for which the partnerships had executed a bond for title, and if the executors then renew the note and execute a bond for title in their own name, the executors may make the conveyance to the debtor under the provisions of this section, irrespective of the joinder of the remaining partners. *Blalock v. Jackson*, 94 Ga. 469, 20 S.E. 346 (1894).

**Rights of debtor's trustee in bankruptcy.** — One holding land under bond for title has no leviable interest therein; but a judgment creditor nevertheless has a lien upon the creditor's interest which may be enforced as provided by this section, and the debtor's trustee in bankruptcy, having the rights of a judgment creditor, has a lien which takes precedence over an unrecorded assignment of the bond. *Fuller v. Atlanta Nat'l Bank*, 254 F. 278 (5th Cir. 1918), cert. denied, 249 U.S. 599, 39 S. Ct. 257, 63 L. Ed. 796 (1919).

**Cited in** *Jordan v. Central City Loan & Trust Ass'n*, 108 Ga. 495, 34 S.E. 132 (1899); *Wilkins, Neely & Jones v. Gibson*, 113 Ga. 31, 38 S.E. 374 (1901); *Black v. Gate City Coffin Co.*, 115 Ga. 15, 41 S.E. 259 (1902); *National Bank v. Ellis*, 148 Ga. 775, 98 S.E. 469 (1919); *Sloan v. Loftis*, 157 Ga. 93, 120 S.E. 781 (1923); *Hiers v. Exum*, 158 Ga. 19, 122 S.E. 784 (1924); *Carnes v. American Agric. Chem. Co.*, 158 Ga. 188, 123 S.E. 18 (1924); *Kidd v. Kidd*, 158 Ga. 546, 124 S.E. 45 (1924); *Miller v. First Nat'l Bank*, 35 Ga. App. 334, 132 S.E. 783 (1926); *Duke v. Ayers*, 163 Ga. 444, 136 S.E. 410 (1927); *Loftis v. Alexander*, 181 Ga. 358, 182 S.E. 2 (1935); *Tanner v. Wilson*, 183 Ga. App. 53, 187 S.E. 625 (1936); *Tanner v. Wilson*, 184 Ga. 628, 192 S.E. 425 (1937); *Campbell v. Gormley*, 184 Ga. 647, 192 S.E. 430 (1937); *S.T. & W.A. Dewees Co. v. Paul B. Carter & Co.*, 190 Ga. 68, 8 S.E.2d 376 (1940); *Bull v. Johnson*, 63 Ga. App. 750, 12 S.E.2d 96 (1940); *Shedden v. National Florence Crittenton Mission*, 191 Ga. 428, 12 S.E.2d 618 (1940); *Dwyer v. Jones*, 201 Ga. 259, 39 S.E.2d 313 (1946); *Pethel v. Liberal Fin. Co.*, 86 Ga. App. 773, 72 S.E.2d 563 (1952); *Jones v. Andrews*, 89 Ga. App. 734, 81



S.E.2d 304 (1954); *Bell v. Allied Fin. Co.*, 215 Ga. 631, 112 S.E.2d 609 (1960); *Milam v. Adams*, 101 Ga. App. 880, 115 S.E.2d 252 (1960); *Dixon v. GMAC*, 105 Ga. App. 413, 124 S.E.2d 660 (1962); *Southern Cem. Consultants, Inc. v. Peachtree Mem. Park*, 218 Ga. 389, 128 S.E.2d 200 (1962);

*Stephens v. Stephens*, 220 Ga. 22, 136 S.E.2d 726 (1964); *Mack Trucks, Inc. v. Ryder Truck Rental, Inc.*, 110 Ga. App. 68, 137 S.E.2d 718 (1964); *Willingham v. Lee*, 124 Ga. App. 641, 185 S.E.2d 553 (1971); *Mason v. Fisher*, 143 Ga. App. 573, 239 S.E.2d 226 (1977).

OPINIONS OF THE ATTORNEY GENERAL

**Tax levy.** — O.C.G.A. § 48-2-55(c), pertaining to tax levies, authorizes the Commissioner of the Department of Revenue and the commissioner’s agents to levy upon a delinquent taxpayer’s equitable

interest in real property encumbered by a deed to secure debt, without first satisfying the requirements of O.C.G.A. § 9-13-60. 1990 Op. Att’y Gen. No. 90-19.

RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 24A Am. Jur. Pleading and Practice Forms, Vendor and Purchaser, §§ 219, 226.

Power of equity court to reach or to sequester, for seizure and sale, beneficial equitable interests in corporate stock shares, 42 ALR2d 920.

**C.J.S.** — 33 C.J.S., Executions, § 47.  
**ALR.** — Judgment as lien on judgment debtor’s equitable interest in real property, 30 ALR 504.

Right of purchaser at execution sale, upon failure of title, to reimbursement or restitution from judgment creditor, 33 ALR4th 1206.

Interest of vendee under executory contract as subject to execution, judgment lien, or attachment, 1 ALR2d 727.

ARTICLE 4

SATISFACTION OR DISCHARGE OF JUDGMENT  
AND EXECUTION

RESEARCH REFERENCES

**ALR.** — Judgment lien or levy of execution on one joint tenant’s share or inter-

est as severing joint tenancy, 51 ALR4th 906.

9-13-70. Suspension of execution for 60 days pending payment;  
bond.

(a) In all cases in which a verdict or judgment is rendered, the party against whom the same is entered may, either in open court or in the clerk’s office, within four days after the adjournment of court, enter into bond with good and sufficient security for the payment of the verdict or judgment and costs within 60 days.

(b) When bond and security have been given as provided in this Code section, the verdict and judgment, or the execution thereon, shall be suspended for the 60 days. If the party fails to pay the verdict or



judgment within that time, execution shall issue against the party and his security without further proceedings thereon. (Laws 1799, Cobb's 1851 Digest, p. 494; Code 1863, §§ 3588, 3589; Code 1868, §§ 3611, 3612; Code 1873, §§ 3661, 3662; Code 1882, §§ 3661, 3662; Civil Code 1895, §§ 5439, 5440; Civil Code 1910, §§ 6044, 6045; Code 1933, §§ 39-501, 39-502.)

**Law reviews.** — For note discussing legal and equitable relief from execution

available to debtors, see 12 Ga. L. Rev. 814 (1978).

### JUDICIAL DECISIONS

**Purpose of this section** is to place upon the security of a stay bond the whole liability theretofore resting upon the defendant in fi. fa., and to suspend execution. *Walker v. Lott-Lewis Co.*, 15 Ga. App. 767, 84 S.E. 195 (1915).

**Giving of stay bond is recognition of validity of judgment**, and amounted to a waiver of want of jurisdiction as to the person. *Glennville Bank v. Deal*, 146 Ga. 127, 90 S.E. 958 (1916).

**Stay bond binds property of security from date of bond's execution.** *Hayden v. Anderson*, 57 Ga. 378 (1876); *Gwyer v. Kennedy*, 61 Ga. 255 (1878).

**Surety on stay bond is not discharged because bond was not given within time prescribed.** *Walker v. Lott-Lewis Co.*, 15 Ga. App. 767, 84 S.E. 195 (1915).

**Effect of bankruptcy on execution.** — Bankrupt discharged after judgment against the bankrupt in an action brought while the bankruptcy proceedings were pending is entitled to a perpetual stay of the execution on the judgment. If the discharge of the bankrupt had been granted before the judgment was rendered, the ruling would be otherwise. *Strickland v. Brown*, 19 Ga. App. 73, 90 S.E. 1039 (1916).

If judgment is entered before discharge in bankruptcy, the discharge may be availed of as a bar to further proceedings on the judgment. *Wofford Oil Co. v.*

*Womack*, 46 Ga. App. 246, 167 S.E. 331 (1933).

After discharge, a bankrupt is entitled to a perpetual stay of the execution on the judgment, although the bankrupt did not, before the rendition of the judgment, ask for a stay of the proceedings in the state court. *Wofford Oil Co. v. Womack*, 46 Ga. App. 246, 167 S.E. 331 (1933).

**Judgment debtor entitled to stay of execution pending bankruptcy proceedings.** — Since it did not appear from the petition of the defendants that a discharge in bankruptcy had been applied for, but it affirmatively appeared that the time for making such application had not expired, and because the defendants would have been entitled, on receiving the defendants' discharge in bankruptcy, to plead the bankruptcy by petition in the court in which the judgment was rendered for the purpose of obtaining a perpetual stay of the execution issued against the defendants on the debts sued on, which it appears were dischargeable in bankruptcy, the defendants were entitled, pending the defendants' application for discharge, to have further proceedings to enforce the judgment against the defendants stayed at least until the expiration of the time fixed by the statute, or until, during such time, the matter of the defendants' discharge could be determined by the bankruptcy court. *Wofford Oil Co. v. Womack*, 46 Ga. App. 246, 167 S.E. 331 (1933).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 301 et seq.

**Am. Jur. Pleading and Practice Forms.** — 9A Am. Jur. Pleading and Practice Forms, Executions, § 170.



**C.J.S.** — 33 C.J.S., Executions, § 247 et seq.

**ALR.** — Effect of supersedeas or stay on antecedent levy, 90 ALR2d 483.

### **9-13-71. Sufficient levy on personalty prima-facie satisfaction; effect of dismissal.**

A levy upon personal property sufficient to pay the debt, which levy is unaccounted for, shall be prima-facie evidence of satisfaction to the extent of the value of the property. The unexplained dismissal of the levy shall be an abandonment of the lien so far as third persons are concerned. (Orig. Code 1863, § 3584; Code 1868, § 3607; Code 1873, § 3657; Code 1882, § 3657; Civil Code 1895, § 5442; Civil Code 1910, § 6047; Code 1933, § 39-601.)

### **JUDICIAL DECISIONS**

**This section does not apply to levy upon real estate.** Deloach & Wilcoxson v. Myrick, 6 Ga. 410 (1849); Dowdell v. Neal, 10 Ga. 148 (1851); Overby v. Hart, 68 Ga. 493 (1882).

**First rule stated in this section relates to rights of immediate parties to levy,** which cast the burden of proof on the plaintiff in fi. fa. to account for the levy. Newsom v. McLendon, 6 Ga. 392 (1849); Lynch v. Pressley, 8 Ga. 327 (1850).

**When execution satisfied.** — Legal presumption is that execution has been satisfied when levy is not accounted for or the dismissal of the levy is not explained; but like any other legal presumption, the presumption may be rebutted by the facts of the case. Strobel v. Gormley, 50 Ga. App. 358, 178 S.E. 192 (1935).

**When levy has been made and dismissed, it must be shown that execution was not satisfied thereby;** for if it is unexplained, it will be considered as an abandonment of the lien so far as third persons are concerned. Strobel v. Gormley, 50 Ga. App. 358, 178 S.E. 192 (1935).

**No presumption of satisfaction arises when property is sold for sum insufficient** to satisfy the execution. V.M.C. Prods., Inc. v. Henry, 88 Ga. App. 261, 76 S.E.2d 451 (1953).

**Dismissal when levy unproductive**

**sufficient to account for dismissal.** — Levy of personal property which has been dismissed by the plaintiff or the plaintiff's attorney, without being productive, and when no injury has resulted from such dismissal, sufficiently accounts for, and explains such levy to authorize the plaintiff to proceed with the levy's collection, and to enable it to participate in the distribution of a fund in court raised from the sale of the defendant's property according to its priority. Strobel v. Gormley, 50 Ga. App. 358, 178 S.E. 192 (1935).

**Dismissal of levy on senior fieri facias is not satisfaction of judgment;** it does not displace the lien of such execution of judgment to that of junior liens; the fact that the levy is dismissed and the property left in the possession of the defendant sufficiently accounts for and explains such levy so as to enable the plaintiff to enforce the plaintiff's lien by levy, in claiming money in court, according to the levy's priority, as effectually as though no such levy had been made, because if the property is left in the possession of the debtor the debtor is not injured and loses nothing, and the debtor cannot complain. Strobel v. Gormley, 50 Ga. App. 358, 178 S.E. 192 (1935).

**Cited in** Strobel v. Gormley, 50 Ga. App. 358, 178 S.E. 192 (1935); V.M.C. Prods., Inc. v. Henry, 88 Ga. App. 261, 76 S.E.2d 451 (1953).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 255.

**C.J.S.** — 33 C.J.S., Executions, § 524.

## 9-13-72. Release of property subject to execution.

If the plaintiff in execution, for a valuable consideration, releases property which is subject to execution, the release shall be a satisfaction of the execution to the extent of the value of the property so released insofar as purchasers and creditors are concerned. However, nothing in this Code section shall apply to any such release made by the transferee of any execution issued for taxes due the state or any county or municipality therein or of any execution issued by any municipality on account of assessments made against real estate for street or other improvements. In all such cases the execution shall be discharged or satisfied only to the extent of the amount of taxes or other assessments owing by the parcel released. (Orig. Code 1863, § 3585; Code 1868, § 3608; Code 1873, § 3658; Code 1882, § 3658; Civil Code 1895, § 5443; Civil Code 1910, § 6048; Ga. L. 1929, p. 172, § 1; Code 1933, § 39-602.)

## JUDICIAL DECISIONS

**This section does not apply when a secured creditor acted as an agent of the debtor** by paying claims of third persons. *Farmers & Merchants Bank v. Reeves*, 20 Ga. App. 219, 92 S.E. 971 (1917).

**Language, "a valuable consideration," in this section means** a consideration founded on money, or something convertible to money, or having a value in money, except marriage, which is a valuable consideration, and such valuable consideration must flow to the plaintiff in execution. *Saunders v. Citizens First Nat'l Bank*, 165 Ga. 558, 142 S.E. 127 (1928); *Bradley v. De Loach*, 176 Ga. 142, 167 S.E. 301 (1932).

**Principle embodied in this section is not applicable when** the plaintiff in execution receives no benefit from a release, but a third person incidentally receives a benefit therefrom. *Saunders v. Citizens First Nat'l Bank*, 165 Ga. 558,

142 S.E. 127 (1928); *Bradley v. De Loach*, 176 Ga. 142, 167 S.E. 301 (1932).

**Release of property given for valuable consideration inures to benefit of third persons.** *Foster v. Rutherford*, 20 Ga. 676 (1856); *Molyneaux v. Collier*, 30 Ga. 731 (1860).

**Rights of contesting creditors, not parties to compromise** between the plaintiff and the defendant, are not affected. *Chisolm v. S.B. Chittenden & Co.*, 45 Ga. 213 (1872).

**Cited in** *Williams, Birnie & Co. v. Brown*, 57 Ga. 304 (1876); *Clark v. Monroe County Bank*, 33 Ga. App. 81, 125 S.E. 603 (1924); *Security Mtg. Co. v. Bailey*, 167 Ga. 119, 144 S.E. 899 (1928); *Bradley v. De Loach*, 176 Ga. 142, 167 S.E. 301 (1932); *Federal Land Bank v. Moultrie Banking Co.*, 178 Ga. 150, 172 S.E. 455 (1934); *Boswell v. Federal Land Bank*, 181 Ga. 258, 182 S.E. 1 (1935).



## RESEARCH REFERENCES

**C.J.S.** — 33 C.J.S., Executions, § 60.

### 9-13-73. Application of fund to younger lien with senior lienholder's consent.

If an execution creditor having the older lien on a fund in the hands of the sheriff or other officer allows the fund by his consent to be applied to a younger writ of execution, it shall be considered an extinguishment pro tanto of the creditor's lien insofar as third persons may be concerned. (Orig. Code 1863, § 3586; Code 1868, § 3609; Code 1873, § 3659; Code 1882, § 3659; Civil Code 1895, § 5444; Civil Code 1910, § 6049; Code 1933, § 39-603.)

## JUDICIAL DECISIONS

**This section imposes duty on execution creditor to assert the creditor's lien**, regardless of under which execution the money is raised. *Rushin v. Shields & Ball*, 11 Ga. 636 (1852).

**This section applies when creditor purchases younger fi. fa.**, and accepts satisfaction thereof. *Newton v. Nunnally*, 4 Ga. 356 (1848).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 516 et seq.

**C.J.S.** — 33 C.J.S., Executions, § 232.

### 9-13-74. Release by agreement.

An agreement for a valuable consideration never to enforce a judgment or execution shall release the judgment or execution. (Orig. Code 1863, § 3587; Code 1868, § 3610; Code 1873, § 3660; Code 1882, § 3660; Civil Code 1895, § 5445; Civil Code 1910, § 6050; Code 1933, § 39-604.)

## JUDICIAL DECISIONS

**Fact that judgment is not to be enforced for limited time** will not preclude levy. *Tarver v. Tarver*, 53 Ga. 43 (1874).

**Necessity of consideration.** — Executory agreement by the plaintiff in execution with the defendant to accept in payment less than the whole amount of the debt is not obligatory without a fresh consideration to support it, and mere payment of a part of the sum agreed on will not serve as a consideration. *McLure v.*

*McLure*, 159 Ga. App. 18, 282 S.E.2d 674 (1981).

**Covenant not to sue is not a release** nor a present abandonment or relinquishment of a right or claim, but merely an agreement not to enforce an existing cause of action; and, although it may operate as a release between the parties to the agreement, it will not release a claim against joint obligors or joint tortfeasors. *Georgia R.R. Bank & Trust Co. v. Griffith*, 176 Ga. App. 198, 335 S.E.2d 417 (1985).



**Covenant not to sue construed as release if action brought.** — When there is a covenant not to sue, it is important that the parties to the covenant not be sued in fact or in fiction after the agreement has been executed. Otherwise, the substance of the agreement will be construed to be a release from judgment and will act to release all joint tortfeasors. *Weems v. Freeman*, 234 Ga. 575, 216 S.E.2d 774 (1975).

If a defendant has secured an agreement whereby the defendant is not to be sued, the defendant certainly should not thereafter be sued to judgment. If, in a continuation of the litigation, the defendant is sued to judgment, then regardless of what it is denominated, the agreement definitely cannot be a covenant "not to sue," but must instead be an agreement "not to enforce the judgment" which is subsequently rendered in the case. If the agreement is one "not to enforce a judgment" rather than a covenant "not to sue," all defendants who would otherwise be jointly liable on the judgment are released thereby. *Bevill v. North Bros. Co.*, 168 Ga. App. 97, 308 S.E.2d 215 (1983).

**Otherwise valid covenant not to sue does not automatically become a general release** in the mere event that a suit is subsequently instituted jointly against the covenantees and others. The preexisting "covenant not to sue" is, as to the institution of the later action against the covenantees, solely a matter of defense, a defense which other tortfeasors do not share with the covenantees. The covenantees may be dismissed and the litigation can proceed without them. *Bevill v. North Bros. Co.*, 168 Ga. App. 97, 308 S.E.2d 215 (1983).

**Agreement not to enforce judgment subject to release covenant distinction.** — Distinction between a release and a covenant not to sue also applies to agreements not to enforce a judgment. *Georgia R.R. Bank & Trust Co. v. Griffith*, 176 Ga. App. 198, 335 S.E.2d 417 (1985).

**Breach of contract not to enforce judgment.** — When a creditor obtains a judgment, and the parties agree to settle the judgment for a lesser amount, but the creditor then levies a garnishment to collect the full amount, the debtor may not

bring an action for malicious abuse of process, but the debtor may allege a claim for damages for breach of a contract not to enforce a judgment. *McKellar v. Associates Fin. Servs., Inc.*, 168 Ga. App. 9, 308 S.E.2d 410 (1983).

**Agreement held not release when judgment would be sought absent compliance.** — Release by agreement was not reached pursuant to O.C.G.A. § 9-13-74 since the agreement contemplated that the full amount of the judgment would have been sought in the event the party failed to comply with the obligations under the agreement. *Crim v. Jones*, 204 Ga. App. 289, 419 S.E.2d 130 (1992).

**Covenant not in full satisfaction of judgment not release of all joint defendants.** — When a plaintiff in a medical malpractice action who was awarded 3.8 million dollars by a jury covenanted with all joint defendants but one not to enforce the judgment in consideration for 2.7 million dollars and abandonment of any further legal action by those defendants, the covenant did not release the noncovenanting joint tortfeasor when the covenant was not made in full satisfaction of the judgment, did not purport to release all the joint defendants, and did not represent an attempt to obtain jurisdiction fraudulently or to discredit the veracity of the record. *Revis v. Forsyth County Hosp. Auth.*, 170 Ga. App. 366, 317 S.E.2d 237 (1984).

**Release of judgment good as to all joint defendants.** — Release of judgment against two defendants in favor of one of the defendants, without the knowledge or consent of the other, acts as an absolute release of both, even though the plaintiff stipulates that the release is not to affect collection from the one not a party thereto. *Weems v. Freeman*, 234 Ga. 575, 216 S.E.2d 774 (1975).

**When judgment creditor settled with one of two judgment debtors for less than the full amount** of the judgment and did not preclude the judgment creditor from enforcing the judgment against the second judgment debtor, even though the parties demonstrated the agreement was a release, the agreement must be considered a covenant not to enforce the judgment. *Georgia R.R. Bank*



& Trust Co. v. Griffith, 176 Ga. App. 198, 335 S.E.2d 417 (1985).

**Consent judgment and agreement not to enforce judgment.** — When a single suit is brought against several joint tortfeasors in a county where one of them is a resident, and the others reside outside the county, a consent judgment and an agreement not to enforce the judgment constitute a finding that the resident is liable and do not deprive the trial court of jurisdiction over the nonresident defendants in the county where the suit was brought. *Motor Convoy, Inc. v. Brannen*, 194 Ga. App. 795, 391 S.E.2d 671, *aff'd*, 260 Ga. 340, 393 S.E.2d 262 (1990).

**Retention of right to proceed.** —

When a settlement agreement between a creditor and one of two guarantors of a note clearly provided that the guarantor's payments were not a full satisfaction of amounts due on the note and that the creditor retained the right to proceed against the second guarantor, the agreement could not be construed as a general release of the second guarantor under O.C.G.A. § 9-13-74 or O.C.G.A. § 13-4-80. *Groover v. Commercial Bancorp*, 220 Ga. App. 13, 467 S.E.2d 355 (1996).

**Cited in** *Mercantile Nat'l Bank v. Founders Life Assurance Co.*, 236 Ga. 71, 222 S.E.2d 368 (1976); *Marret v. Scott*, 212 Ga. App. 427, 441 S.E.2d 902 (1994).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 249 et seq.

**C.J.S.** — 33 C.J.S., Executions, § 233.

**ALR.** — Failure to revive judgment against a number jointly, as to some of them, as making applicable the rule that a release of one is a release of all, 160 ALR 678.

Interest on consideration returned or

tendered as condition of setting aside release or compromise, 53 ALR2d 749.

Validity of release from civil liability where release is executed by person while incarcerated, 86 ALR3d 1230.

Validity and effect, as between former spouses, of agreement releasing parent from payment of child support provided for in an earlier divorce decree, 100 ALR3d 1129.

## 9-13-75. Setoff of judgments; collection of balance.

One judgment may be set off against another, on motion, whether in the hands of an original party or an assignee. The balance on the larger is collectable under execution. The rights of an assignee shall not be interfered with if bona fide and for value. (Orig. Code 1863, §§ 2843, 3396; Code 1868, §§ 2851, 3415; Code 1873, §§ 2902, 3467; Code 1882, §§ 2902, 3467; Civil Code 1895, §§ 3748, 5086; Civil Code 1910, §§ 4342, 5670; Code 1933, § 39-605; Ga. L. 1993, p. 91, § 9.)

**Law reviews.** — For survey article on recent developments in Georgia law of

remedies, see 34 Mercer L. Rev. 397 (1982).

## JUDICIAL DECISIONS

**This section applies when the defendant had legal title to judgment** at commencement of suit. *Lee v. Lee*, 31 Ga. 26, 76 Am. Dec. 681 (1860); *Cleckley v. Beall*, 37 Ga. 607 (1868).

**This section provides that judgments may be set off against each**

**other** regardless of when the judgments were acquired, and it is not necessary for a setoff that a party own a judgment sought to be set off at the time of an action against the party resulting in a judgment against the party. It would be entirely unreasonable and unjust to say that the



owner of a judgment would be entirely remediless to set off one judgment against another simply because the owner acquired the judgment after an action was filed against the owner. *Piedmont Sav. Co. v. Davis*, 55 Ga. App. 386, 190 S.E. 386 (1937).

**Former Civil Code 1910, § 5969** (see now O.C.G.A. §§ 9-12-21 and 9-13-34) **declared in express terms the same principles** involved in former Civil Code 1910, §§ 4342 and 5670 (see now O.C.G.A. § 9-13-75). *Odom v. Attaway*, 173 Ga. 883, 162 S.E. 279 (1931).

**Right conferred by express statute.** — Right of setting off one judgment against another is conferred by express statute. *Bradshaw v. George Thompson Ford, Inc.*, 153 Ga. App. 562, 266 S.E.2d 262 (1980).

**Motion is prerequisite.** — Setoff is not automatic, but, as provided by O.C.G.A. § 9-13-75, must be preceded by a motion. *Pinkerton & Laws, Inc. v. Macro Constr., Inc.*, 226 Ga. App. 169, 485 S.E.2d 797 (1997).

**When judgment is obtained against several defendants**, one of the defendants is entitled to setoff against the plaintiff. *Odom v. Attaway*, 173 Ga. 883, 162 S.E. 279 (1931); *Bradshaw v. George Thompson Ford, Inc.*, 153 Ga. App. 562, 266 S.E.2d 262 (1980).

**Judgments founded on actions ex contractu** may be set off to those founded ex delicto. *Langston v. Roby*, 68 Ga. 406 (1882).

**When all parties to different judgments are not the same.** — One judgment may be set off against another, although all parties to different records are not the same. *Skrine v. Simmons*, 36 Ga. 402 (1867); *Langston v. Roby*, 68 Ga. 406 (1882); *Odom v. Attaway*, 173 Ga. 883, 162 S.E. 279 (1931); *Bradshaw v. George Thompson Ford, Inc.*, 153 Ga. App. 562, 266 S.E.2d 262 (1980).

**In order that judgment may be available as setoff, the judgment must be owned absolutely** by the party seeking to use the judgment for that purpose; but there is no objection to a party purchasing a judgment for the purpose of using it as a setoff, if this be done bona fide; when a judgment is assigned, ques-

tions may arise between the assignor and the assignee in regard to their respective rights under an attempted use of the judgment as a setoff. *Odom v. Attaway*, 173 Ga. 883, 162 S.E. 279 (1931).

**Right of setoff may be exercised although practical result may be extinguishment** of such judgment in whole or in part, and thereby the attorney may lose the power of enforcing the judgment for the attorney's fee. *Langston v. Roby*, 68 Ga. 406 (1882); *Bradshaw v. George Thompson Ford, Inc.*, 153 Ga. App. 562, 266 S.E.2d 262 (1980).

**Claim of judgment assignee is subject to equities and defenses** of judgment debtor at time of assignment, but is not subject to rights which did not then exist in favor of such judgment debtor and of which the judgment debtor did not become possessed until some time later, as by the subsequent purchase of judgments against the judgment creditor. Accordingly, a judgment which is held by an assignee is not subject to a setoff in favor of judgments existing against the assignor, but not acquired by the judgment debtor until after the assignment of the former judgment. *Sheffield v. Preacher*, 175 Ga. 719, 165 S.E. 742 (1932).

**Judgment against one in one's individual capacity** cannot be set off against one in one's favor as trustee. *Daniel v. Bush*, 80 Ga. 218, 4 S.E. 271 (1887).

**Requisites to sustaining action on judgment.** — To sustain an action on a judgment, the plaintiff must show the defendant to have become bound by a personal judgment for the unconditional payment of a definite sum of money. *Lyons Mfg. Co. v. Wembley Indus., Inc.*, 253 Ga. 39, 315 S.E.2d 906 (1984).

**Accruing of post judgment interest until set-off effective.** — Trial court did not err in adding interest to the award before considering whether the judgment was greater than the demand for purposes of O.C.G.A. § 51-12-14, as § 51-12-14 had to be construed in pari materia with O.C.G.A. § 7-4-12; post-judgment interest continued to accrue under § 7-4-12 until the set-off became effective under O.C.G.A. § 9-13-75. *Sec. Life Ins. Co. v. St. Paul Marine & Fire Ins. Co.*, 263 Ga. App. 525, 588 S.E.2d 319 (2003).



**Cited** in *Attaway v. Attaway*, 193 Ga. 51, 17 S.E.2d 72 (1941).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 279.  
**ALR.** — Setoff as between judgments, 121 ALR 478.  
Husband’s right to set off wife’s debt against alimony or child support payments, 100 ALR2d 925.  
Spouse’s right to set off debt owed by other spouse against accrued spousal or child support payments, 11 ALR5th 259.

9-13-76. Execution by defendant after setoff.

In all cases of mutual debts and setoffs where the jury finds a balance for the defendant, the defendant may enter judgment for the amount and take out execution in the manner as plaintiffs may do by this Code, provided that the defendant at the time of filing his answer files therewith a true copy or copies of the subject matter of such setoffs. (Laws 1799, Cobb’s 1851 Digest, p. 487; Code 1863, § 3398; Code 1868, § 3417; Code 1873, § 3469; Code 1882, § 3469; Civil Code 1895, § 5088; Civil Code 1910, § 5672; Code 1933, § 39-606.)

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**Jury may find balance for defendant when defendant’s damages proven larger.** — If the damages sustained by the defendant are proven larger than those shown to have been sustained by the plaintiff, the jury is authorized to find such balance for the defendant. *Seagraves v. Nunnelly*, 99 Ga. App. 420, 108 S.E.2d 737 (1959).  
**Requisites to sustaining action on judgment.** — To sustain an action on a judgment, the plaintiff must show the defendant to have become bound by a personal judgment for the unconditional payment of a definite sum of money. *Lyons Mfg. Co. v. Wembley Indus., Inc.*, 253 Ga. 39, 315 S.E.2d 906 (1984).  
**Cited** in *Davis v. Crane Co.*, 62 Ga. App. 334, 7 S.E.2d 783 (1940).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 279.  
**ALR.** — Husband’s right to set off wife’s debt against alimony or child support payments, 100 ALR2d 925.  
Spouse’s right to set off debt owed by other spouse against accrued spousal or child support payments, 11 ALR5th 259.

9-13-77. Control of execution after payment — By security.

The security paying off an execution shall have control thereof. (Laws 1826, Cobb’s 1851 Digest, p. 593; Code 1863, § 3590; Code 1868, § 3613; Code 1873, § 3663; Code 1882, § 3663; Civil Code 1895, § 5441; Civil Code 1910, § 6046; Code 1933, § 39-607.)



## JUDICIAL DECISIONS

**Cited** in *Beacham v. Cullens*, 194 Ga. 739, 22 S.E.2d 508 (1942); *Wilson v. Fulton Metal Bed Mfg. Co.*, 88 Ga. App. 884, 78 S.E.2d 360 (1953).

## RESEARCH REFERENCES

**C.J.S.** — 33 C.J.S., Executions, § 336. ALR 1596; 32 ALR 568; 46 ALR 857; 53 ALR. — Payment of entire claim of third person as condition of subrogation, 9 ALR 304; 91 ALR 855.

## 9-13-78. Control of execution after payment — By joint debtor.

When judgments have been obtained against several persons and one of them has paid more than his just proportion of the same, he may have full power to control and use the execution as securities in execution control the same against principals or cosureties by having this payment entered on the execution issued to enforce the judgment, and he shall not be compelled to bring an action against the codebtors for the excess of payment on the judgment. (Ga. L. 1871-72, p. 54, § 1; Code 1873, § 3599; Code 1882, § 3599; Civil Code 1895, § 5376; Civil Code 1910, § 5971; Code 1933, § 39-608.)

**Cross references.** — Right to contribution among joint trespassers; effect of settlement, § 51-12-32.

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**Remedy not exclusive.** — There is nothing in this section to indicate that the legislature intended to make this statutory remedy exclusive and, thus, deprive a person of the right to pursue a preexisting accredited method of enforcing contribution from a joint defendant. *City of Rome v. Southern Ry.*, 50 Ga. App. 185, 177 S.E. 520 (1934).

**This section is but cumulative remedy for enforcing contribution.** *City of Rome v. Southern Ry.*, 50 Ga. App. 185, 177 S.E. 520 (1934); *Powell v. Barker*, 96 Ga. App. 592, 101 S.E.2d 113 (1957).

**This section does not preclude joint defendant from setting up agreement** with party who paid, that the defendant's note should be taken for the defendant's part. *Babb v. Brumby*, 141 Ga. 792, 82 S.E. 249 (1914).

**This section applies to judgments against partners based on service upon all of the partners.** *Higdon v.*

*Williamson*, 10 Ga. App. 376, 73 S.E. 528 (1912).

**Word "may" is ordinarily permissive, and not mandatory.** Furthermore, the phrase "and shall not be compelled to sue," (now "to bring an action") etc., lends countenance to the conclusion that "may" is used in the statute in the term's ordinary signification. *City of Rome v. Southern Ry.*, 50 Ga. App. 185, 177 S.E. 520 (1934).

**Equal extension to actions ex contractu and ex delicto.** — Right of contribution extends equally to actions ex contractu and actions ex delicto, when all are equally bound to bear the common burden, and one has paid more than one's share. *City of Rome v. Southern Ry.*, 50 Ga. App. 185, 177 S.E. 520 (1934).

**Showing of payment of debt in full unnecessary.** — It is unnecessary to show that common debt has been paid in full either by the plaintiff or by any other



person. In some decisions there are expressions which might imply that the whole debt must be paid before an action for contribution will lie, but such was not the rule at common law, nor is there any such requirement under this section. *Herrington v. Wimberly*, 177 Ga. 536, 170 S.E. 670 (1933).

**Failure to enter amount paid on execution precludes contribution.** — When an execution issues against two defendants, and is afterwards by the plaintiff in *fi. fa.* transferred to one of the defendants for “value received,” and the transfer is endorsed upon the execution, and there is no entry upon the execution of any amount paid thereon by such defendant, such action amounts to a settlement of the execution, and such defendant taking the transfer of the execution cannot enforce the execution against the other defendant to compel a contribution; nor would the case be altered by the fact that the defendants were partners and the execution was against the partnership. *Easterling v. Adamson*, 28 Ga. App. 257, 110 S.E. 757 (1922); *D.G. Bland Lumber Co. v. Perkins*, 46 Ga. App. 401, 167 S.E. 707 (1933).

**If fieri facias is paid off by joint defendant, that defendant is entitled to have it revived** on becoming dormant, in the name of the plaintiff for the defendant’s use. *Huckaby v. Sasser*, 69 Ga. 603 (1882).

**Transferee of joint debtor paying off execution** would have like right to enforce execution against co-obligor as would the joint debtor personally. *O’Bryan Bros. v. Neel*, 84 Ga. 134, 10 S.E. 598 (1889); *Register v. Southern States Phosphate & Fertilizer Co.*, 157 Ga. 561, 122 S.E. 323 (1924).

**Under this section, justice of peace is collecting officer** as to debts sued in that court, and may make, upon an execution issued from the Supreme Court against joint defendants, the entry of payment by one of them, which is required in order that the paying defendant may control the judgment against the others. *Higdon v. Williamson*, 10 Ga. App. 376, 73 S.E. 528 (1912).

**Payment made to clerk of superior court on judgment** is not good as pay-

ment against plaintiff. *Bank of Georgetown v. Ault & Ault*, 31 Ga. 359 (1860); *Wilcher v. Williams*, 33 Ga. App. 797, 127 S.E. 795 (1925).

**Applicability.** — Trial court erred in entering summary judgment for a creditor in a debtor’s suit seeking to quiet title as: (1) a co-debtor paid the creditor’s note in full, which extinguished the debt; (2) once the note was paid, the collateral should have been released; (3) the creditor could not assign the note to the co-debtor; (4) the co-debtor had only a right to contribution as there was no indication that the co-debtor was a surety under the agreement with the debtor; and (5) O.C.G.A. § 9-13-78 was inapplicable as the statute pertained to the codefendants against whom a judgment had been obtained. *Johnson v. AgSouth Farm Credit*, 267 Ga. App. 567, 600 S.E.2d 664 (2004).

**Interest award reversed.** — Award of interest for a client against an attorney from the date that the client satisfied an underlying judgment against the client, the client’s son, and the attorney had no legal basis and was reversed; it had been established that the client, the client’s son, and the attorney were joint tortfeasors and while O.C.G.A. § 10-7-51 authorized the award of interest running from the date of a cosurety’s payment of a joint obligation, it applied to contribution actions arising from joint instruments executed by the sureties, not to joint tortfeasors. The issue was not controlled by O.C.G.A. § 9-13-78 as it provided a method of enforcing contribution from a joint defendant and it did not purport to control an award of interest; O.C.G.A. § 7-4-12 provided that all money judgments bore post-judgment interest from the date of entry. *Gerschick v. Pounds*, 281 Ga. App. 531, 636 S.E.2d 663 (2006), cert. denied, 2007 Ga. LEXIS 95 (Ga. 2007).

**Cited** in *Miller v. Perkerson*, 128 Ga. 465, 57 S.E. 787 (1907); *Wallace v. Boddie*, 138 Ga. 30, 74 S.E. 756 (1912); *Johnson v. Washington*, 152 Ga. 635, 110 S.E. 889 (1922); *Autry v. Southern Ry.*, 167 Ga. 136, 144 S.E. 741 (1928); *City of Rome v. Southern Ry.*, 47 Ga. App. 489, 170 S.E. 695 (1933); *Chapman v. Lamar-Rankin Drug Co.*, 64 Ga. App. 493, 13 S.E.2d 734 (1941); *Wilson v. Fulton Metal Bed Mfg.*



Co., 88 Ga. App. 884, 78 S.E.2d 360 (1953);  
 Wages v. State Farm Mut. Auto. Ins. Co.,  
 132 Ga. App. 79, 208 S.E.2d 1 (1974).

### RESEARCH REFERENCES

**C.J.S.** — 33 C.J.S., Executions, § 202. Right of one co-judgment debtor who  
**ALR.** — Payment of entire claim of pays judgment to be subrogated thereto as  
 third person as condition of subrogation, 9 against the other co-judgment debtors,  
 ALR 1596; 32 ALR 568; 46 ALR 857; 53 157 ALR 495.  
 ALR 304; 91 ALR 855.

### 9-13-79. Partial payments to be entered.

When a payment on an execution is made which does not entirely satisfy the judgment upon which the execution has been issued, the plaintiff in execution or his attorney shall authorize the clerk to enter the amount of the payments upon the execution. (Code 1933, § 39-609, enacted by Ga. L. 1966, p. 408, § 1.)

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 249 et seq. **C.J.S.** — 33 C.J.S., Executions, § 247 et seq.

### 9-13-80. Execution to be canceled when satisfied; private right of action; damages.

(a) Upon the satisfaction of the entire debt upon which an execution has been issued, the plaintiff in execution or his or her attorney shall timely direct the clerk to cancel the execution and mark the judgment satisfied. Such direction shall be delivered to the clerk not later than 30 days following the date upon which the execution was fully satisfied.

(b)(1) A private right of action shall be granted to a judgment debtor upon the failure of such plaintiff or counsel to comply with the provisions of subsection (a) of this Code section.

(2) Failure to direct cancellation and satisfaction within 60 days after satisfaction of the entire debt shall be prima-facie evidence of untimeliness.

(3) Recovery may be had by way of motion in the action precipitating the judgment and execution or by separate action in any court of competent jurisdiction.

(4) Damages shall be presumed in the amount of \$100.00 and the court may award reasonable attorney's fees. Actual damages may be recovered, but in no event shall recovery exceed \$500.00; provided, however, the court may also award reasonable attorney's fees.



(c) In order to authorize the clerk of superior court to make an entry of satisfaction with respect to an execution on the general execution docket, there shall be presented for filing on the general execution docket:

- (1) A satisfaction upon the original execution or alias execution itself;
- (2) A satisfaction as provided in subsection (d) of this Code section; or
- (3) A satisfaction as provided in subsection (e) of this Code section.

Any clerk of superior court who cancels of record any execution in the manner authorized in this subsection shall be immune from any civil liability, either in such clerk's official capacity or personally, for so canceling of record such security deed.

(d) Proof of satisfaction of an execution, the original of which has been lost, stolen, or otherwise mislaid, may be made based upon an affidavit executed by the plaintiff in execution or owner or holder of record of such execution and who so swears in such affidavit, which affidavit shall be recorded in the execution docket and shall be in the following form:

\_\_\_\_\_ County, Georgia

Affidavit for Satisfaction of Execution

The original execution having been lost or destroyed and the indebtedness, penalties, and interest referred to in that certain writ of fi. fa. styled \_\_\_\_\_ v. \_\_\_\_\_, dated \_\_\_\_\_, and of record in General Execution Docket Book \_\_\_\_\_, Page \_\_\_\_\_, in the office of the clerk of the Superior Court of \_\_\_\_\_ County, Georgia, having been satisfied in full and the undersigned being the present owner of such writ of fi. fa. by virtue of being the plaintiff in fi. fa. or the heir, assign, transferee, or devisee of the original plaintiff in fi. fa., the clerk of such superior court is authorized and directed to make an entry of satisfaction with respect to such writ of fi. fa.

In witness whereof, the undersigned has set his or her hand and seal, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_ (SEAL)

Signature

Signed, sealed, and  
delivered on the  
date above shown

\_\_\_\_\_



Notary Public

(SEAL)

My commission expires: \_\_\_\_\_.

(e) In the event that a plaintiff in execution or any person that owns or holds an execution has failed to properly transmit a legally sufficient satisfaction or cancellation to authorize and direct the clerk or clerks to cancel the execution of record within 60 days after a written notice mailed to such plaintiff in execution or owner or holder of record by registered or certified mail or statutory overnight delivery, return receipt requested, the clerk or clerks are authorized and directed to cancel the execution upon recording an affidavit by the attorney for the judgment debtor against whom the execution was issued or any attorney who has caused the indebtedness and other obligations under the execution to be paid in full or any attorney who has actual knowledge that the indebtedness has been paid in full. The notice shall be mailed to the plaintiff in execution or owner or holder of record, shall identify the execution, and shall include a recital or explanation of this subsection. The affidavit shall include a recital of actions taken to comply with this subsection. Such affidavit shall include as attachments the following items:

(1) A written verification which was given at the time of payment by the plaintiff in execution or owner or holder of record of the amount necessary to pay off such obligations; and

(2) Any one of the following:

(A) Copies of the front and back of a canceled check to the plaintiff in execution or owner or holder of record showing payment of such obligations;

(B) Confirmation of a wire transfer to the owner or holder of record showing payment of such obligations; or

(C) A bank receipt showing payment to the plaintiff in execution or owner or holder of record of such obligations.

(f) Any person who files an affidavit in accordance with subsection (d) or (e) of this Code section which affidavit is fraudulent shall be guilty of a felony and shall be punished by imprisonment for not less than one year nor more than three years or by a fine of not less than \$1,000.00 nor more than \$5,000.00, or both. (Code 1933, § 39-610, enacted by Ga. L. 1966, p. 408, § 1; Ga. L. 1996, p. 1093, § 1; Ga. L. 1997, p. 143, § 9; Ga. L. 2004, p. 407, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1997, in subsection (b), a period was substituted for a semicolon at the end of paragraph (b)(2) and a period was substituted for “; and” at the end of paragraph (b)(3).



## JUDICIAL DECISIONS

**Cited** in *Threatt v. Forsyth County*, 262 Ga. App. 186, 585 S.E.2d 159 (2003).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 254 et seq.

**C.J.S.** — 33 C.J.S., Executions, § 247 et seq.

## ARTICLE 5

## CLAIMS

## 9-13-90. Claims authorized; to be on oath.

When any sheriff or other officer shall levy an execution or other process on property claimed by a third person not a party to the execution, the person, his agent, or his attorney may make oath claiming the property. (Laws 1839, Cobb's 1851 Digest, p. 535; Code 1863, § 3650; Code 1868, § 3675; Code 1873, § 3725; Ga. L. 1877, p. 22, § 1; Code 1882, § 3725; Civil Code 1895, § 4611; Civil Code 1910, § 5157; Code 1933, § 39-801.)

**Law reviews.** — For note discussing procedure under which third parties may file claims for property levied upon, see 12 Ga. L. Rev. 814 (1978).

## JUDICIAL DECISIONS

**Claim is statutory proceeding,** which is authorized when levy has been made on property; the statute contemplates that this shall be done by some person who claims the property and "shall make oath" thereto. *A.J. Evans Mktg. Agency v. Federated Fruit & Vegetable Growers, Inc.*, 170 Ga. 30, 152 S.E. 49 (1930).

**Claim is really intervention authorized by statute** in a proceeding to which the claimant is not a party; therefore, a claim case partakes of the nature of an equitable proceeding. *Georgia Power Co. v. City of Decatur*, 170 Ga. 699, 154 S.E. 268 (1930).

**Claim proceeding provides adequate remedy at law, and precludes injunction** against the enforcement of an execution. *Chambliss v. Kindred*, 214 Ga. 712, 107 S.E.2d 205 (1959).

**No need for an injunction.** — When the plaintiff has an adequate remedy by

claim, the plaintiff does not need an injunction. *Hope v. Glass*, 182 Ga. 514, 185 S.E. 803 (1936).

**Claim laws are cumulative.** — Claim laws, as remedy for true owner, are cumulative, not exclusive. *Whittington v. Doe*, 9 Ga. 23 (1850); *Bodega v. Perkerson*, 60 Ga. 516 (1878); *Southern Ry. v. Moore*, 133 Ga. 806, 67 S.E. 85 (1910).

**Claim laws do not abrogate or supersede prior existing remedies.** *Georgia Power Co. v. City of Decatur*, 170 Ga. 699, 154 S.E. 268 (1930).

**Correct method of contesting levy and sale, by one not party,** is interposition of claim to the property. *George v. Davison-Paxon Co.*, 90 Ga. App. 717, 84 S.E.2d 122 (1954).

Statutory claim is the ordinary remedy when property belonging to some person other than a party to the proceeding has been levied upon. *Allen v. Giddens*, 118 Ga. App. 755, 165 S.E.2d 606 (1968).



**Real parties in claim proceeding are plaintiff and claimant** as it is their rights alone that are settled by the verdict. *First Nat'l Bank v. Roberson*, 53 Ga. App. 142, 184 S.E. 887 (1936).

**Defendant in execution is not party to statutory claim case**, when the only issue made is the ordinary one between the plaintiff in execution and the claimant. *First Nat'l Bank v. Roberson*, 53 Ga. App. 142, 184 S.E. 887 (1936).

**Interest which will support claim under this section** is any interest which renders the property not subject to the levying *fi. fa.* or attachment, or which is inconsistent with the plaintiff's right to proceed in selling the property. *Smith v. Francis*, 221 Ga. 260, 144 S.E.2d 439 (1965).

**Person may interpose claim affidavit although the person does not claim all property.** *Smith v. Francis*, 221 Ga. 260, 144 S.E.2d 439 (1965).

**Claimant need not join other parties with interests in property.** — It is necessary that a person having a valid interest in the property levied upon and advertised for sale under an execution join with that person other parties having similar or identical interests in the property levied upon. *Smith v. Francis*, 221 Ga. 260, 144 S.E.2d 439 (1965).

**Parties or their agents cannot test validity of execution by claim proceedings.** *Zimmerman v. Tucker*, 64 Ga. 432 (1879); *Wynn v. Irvine's Ga. Music House*, 109 Ga. 287, 34 S.E. 582 (1899); *Goolsby v. Board of Drainage Comm'rs*, 156 Ga. 213, 119 S.E. 644 (1923).

**Issue in each case is whether property belongs to claimant.** *Pierce v. DeGraf-fenried*, 43 Ga. 392 (1871).

**Claim must be filed before property is sold**, or before the property has been delivered to another claimant under a forthcoming bond. *Peacock Hdwe. Co. v. Allen*, 33 Ga. App. 654, 127 S.E. 780 (1925).

**Oath required by this section must assert right of property in deponent.** *James Selman & Co. v. Shackelford*, 17 Ga. 615 (1855).

**Affidavit may be made by person claiming title to property or by that person's agent.** *General Motors Accep-*

*tance Corp. ex rel. GMAC v. Allen*, 59 Ga. App. 614, 1 S.E.2d 705 (1939).

**Affidavit is amendable** to the same extent as ordinary petitions. *GMAC v. Allen*, 59 Ga. App. 614, 1 S.E.2d 705 (1939); *Roberts v. Wilson*, 198 Ga. 428, 31 S.E.2d 707 (1944).

**Mistake in immaterial part of affidavit will not vitiate proceedings.** *James Selman & Co. v. Shackelford*, 17 Ga. 615 (1855).

**Commercial notary may administer oath.** *Singletary v. Watson*, 136 Ga. 241, 71 S.E. 162 (1911).

**Claim papers executed in another state.** — Claim affidavit and bond, purporting to be executed in another state before a notary public thereof, cannot be received by a levying officer in this state without due authentication by the judge. *Charles v. Foster*, 56 Ga. 612 (1876).

**Claimant must prove title or superior interest.** — On the trial of a claim, after the plaintiff has made out a *prima facie* case, in order to successfully overcome it the claimants must show title in themselves, or such an interest as would be superior to the right of the plaintiff in *fi. fa.* to proceed with the execution or attachment. *A.J. Evans Mktg. Agency v. Federated Fruit & Vegetable Growers, Inc.*, 170 Ga. 30, 152 S.E. 49 (1930).

**Claimant cannot protect property by showing paramount title in third person.** *Rowland v. Gregg & Son*, 122 Ga. 819, 50 S.E. 949 (1905); *A.J. Evans Mktg. Agency v. Federated Fruit & Vegetable Growers, Inc.*, 170 Ga. 30, 152 S.E. 49 (1930).

**Plaintiff in execution in claim case may bring independent equitable petition** in aid of the plaintiff's levy and set up therein any matter which would make the enforcement of the plaintiff's execution legal and proper. And the plaintiff can likewise offer an amendment in the claim case and set up any matter which is germane to the issue or which tends to show that the property is subject to the execution. *Georgia Power Co. v. City of Decatur*, 170 Ga. 699, 154 S.E. 268 (1930).

**In claim cases, possession of property after sale is badge of fraud;** the badge, however, is only *prima facie* and may be explained, the sufficiency of the



explanation being for the jury. *Fincher v. Harlow*, 56 Ga. App. 578, 193 S.E. 452 (1937).

**Law does not put upon creditor burden of establishing fraud** in conveyance to third party claimant. On the contrary, the law puts the burden upon the claimant and debtor. They must show that the transaction as a whole is free from fraud. *Moore v. Loganville Mercantile Co.*, 184 Ga. 351, 191 S.E. 121 (1937).

**Administrator has remedy at law, by filing of claim** to property where land is levied on as property of an estate and the administrator claims that the title thereto is in the administrator individually. *Arrington v. Spear*, 181 Ga. 419, 182 S.E. 521 (1935).

**Factors who have made advances may file claim**, but the agent of a third party cannot interpose a claim in the agent's own name to protect the agent's principal. *Rowland v. Gregg & Son*, 122 Ga. 819, 50 S.E. 949 (1905).

**Partner, or joint owner, may interpose claim in behalf of all.** *Blackwell v. Pennington & Sons*, 66 Ga. 240 (1880).

**Third party may file claim to funds caught by process of garnishment.** *Drummond v. Drummond*, 71 Ga. App. 474, 31 S.E.2d 74 (1944).

**Claim for remainder interests in real estate.** — When remainder interests in real estate were in fact levied on under an execution which was issued in personam and to which the remaindermen were not parties, they had the right and privilege of asserting a claim to such remainder interests, notwithstanding the life tenant was still in life;

and a claim of the whole title would necessarily comprehend lesser interests such as estates in remainder. *Cox v. Hargrove*, 205 Ga. 12, 52 S.E.2d 312 (1949).

**Junior security holder may file claim to funds garnished in hands of senior.** — When the creditor of the grantor in both the senior and junior security deeds undertakes to reach the funds in the hands of the holder of the senior security deed by the process of garnishment the holder of the junior security deed may file a claim to the funds. *Columbus Plumbing, Heating & Mill Supply Co. v. Home Fed. Sav. & Loan Ass'n*, 216 Ga. 706, 119 S.E.2d 118 (1961).

**Cited in** *Becker v. Truitt*, 39 Ga. App. 286, 146 S.E. 654 (1929); *Perry v. Gormley*, 177 Ga. 372, 170 S.E. 223 (1933); *Wilson v. City of Eatonton*, 180 Ga. 598, 180 S.E. 227 (1935); *D.A. Schulte, Inc. v. Varron*, 181 Ga. 542, 182 S.E. 912 (1935); *D.A. Schulte, Inc. v. Varron*, 52 Ga. App. 683, 184 S.E. 356 (1936); *Tippins v. Lane*, 184 Ga. 331, 191 S.E. 134 (1937); *Fincher v. Harlow*, 56 Ga. App. 578, 193 S.E. 452 (1937); *State Banking Co. v. Miller*, 185 Ga. 653, 196 S.E. 47 (1938); *Hodges v. Tattnall Bank*, 185 Ga. 657, 196 S.E. 421 (1938); *Huling v. Huling*, 194 Ga. 819, 22 S.E.2d 832 (1942); *Rowland v. Rich's, Inc.*, 212 Ga. 640, 94 S.E.2d 688 (1956); *Associates Disct. Corp. v. Willard*, 99 Ga. App. 116, 108 S.E.2d 110 (1959); *Hardy v. George C. Murdock Freight Lines*, 99 Ga. App. 459, 108 S.E.2d 739 (1959); *Fowler v. Stansell*, 221 Ga. 630, 146 S.E.2d 726 (1966); *Drillers Serv., Inc. v. Moody*, 242 Ga. 123, 249 S.E.2d 607 (1978); *Walter E. Heller & Co. v. Aetna Bus. Credit, Inc.*, 158 Ga. App. 249, 280 S.E.2d 144 (1981).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 129 et seq.

**C.J.S.** — 33 C.J.S., Executions, § 335.

## 9-13-91. Bond and security for damages; how damages determined.

The person claiming the property levied on, or his agent or attorney, shall give bond to the sheriff or other levying officer, with good and sufficient security in a sum not larger than double the amount of the execution levied, made payable to the plaintiff in execution. Where the



property levied on is of less value than the execution, the amount of the bond shall be double the value of the property levied upon, at a reasonable valuation to be judged by the levying officer, conditioned to pay the plaintiff in execution all damages which the jury on the trial of the claim may assess against the person claiming the property in case it appears that the claim was made for the purpose of delay only. (Laws 1821, Cobb's 1851 Digest, p. 533; Code 1863, §§ 3651, 3654; Code 1868, §§ 3676, 3679; Ga. L. 1872, p. 41, § 1; Code 1873, §§ 3726, 3729; Code 1882, §§ 3726, 3729; Civil Code 1895, §§ 4612, 4615; Civil Code 1910, §§ 5158, 5161; Code 1933, § 39-802.)

### JUDICIAL DECISIONS

**Former Code 1933, § 39-802 (see now O.C.G.A. § 9-13-91) made mandatory giving of bond made payable to plaintiff in execution** in at least double the amount of the value of the property levied upon, conditioned to pay all damages which the plaintiff may sustain if the jury found that the claim was made for purposes of delay only, but former Code 1933, § 39-807 (see now O.C.G.A. § 9-13-92) provided that a pauper's affidavit may be given if the claimant shall be unable to give the bond and security required. *George v. Davison-Paxon Co.*, 90 Ga. App. 717, 84 S.E.2d 122 (1954).

**It is mandatory that claimant either give bond or file pauper's affidavit.** *Hand v. Frank W. Hall Merchandise Co.*, 91 Ga. 130, 16 S.E. 644 (1893); *George v. Davison-Paxon Co.*, 90 Ga. App. 717, 84 S.E.2d 122 (1954).

**Presumption that claimant has given damage bond** required by this section is present when the claim is pending in superior court. *Hand v. Frank W. Hall Merchandise Co.*, 91 Ga. 130, 16 S.E. 644 (1893); *Drummond v. Drummond*, 71 Ga. App. 474, 31 S.E.2d 74 (1944).

**Court will also presume bond given when no objection made** as to lack of bond in the trial court and in the absence of a clear showing to the contrary. *First Nat'l Bank & Trust Co. v. McElmurray*, 120 Ga. App. 134, 169 S.E.2d 720 (1969).

**Bond conditioned to pay whatever damages are assessed under former Code 1933, § 39-907 (see now O.C.G.A. § 9-13-105)** was valid under former Code 1910, §§ 5158 and 5161 (see now O.C.G.A. § 9-13-91). *Mutual Fertilizer*

*Co. v. White & Son*, 26 Ga. App. 134, 106 S.E. 19, cert. denied, 26 Ga. App. 801 (1921).

**Forthcoming bond under former Code 1868, §§ 3678 — 3680 (see now O.C.G.A. § 9-13-94) cannot be substituted** for damages bond under former Code 1868, §§ 3676 and 3679 (see now O.C.G.A. § 9-13-91). *Raiford v. Taylor*, 43 Ga. 250 (1871).

**No attestation or approval of bond for damages is necessary** other than acceptance of a properly executed bond by the levying officer. *GMAC v. Allen*, 59 Ga. App. 614, 1 S.E.2d 705 (1939).

**It is no ground for dismissal of claim that damage bonds were not approved** or attested by levying officer, or by anyone else. *GMAC v. Allen*, 59 Ga. App. 614, 1 S.E.2d 705 (1939).

**Sheriff is not obligated to accept improperly executed bond for damages.** *Allen v. Giddens*, 118 Ga. App. 755, 165 S.E.2d 606 (1968).

**Defective claim bond may be amended.** *Lee v. Mills*, 69 Ga. 740 (1882).

If a claim bond does not conform to this section, the bond may be amended. If the bond be so defective as not to protect the plaintiff in fieri facias and no amendment be offered, the claim will be dismissed. *Sabin Robbins Paper Co. v. Wilson*, 70 Ga. App. 42, 27 S.E.2d 254 (1943).

**Corporate agent must show authority for execution of bond.** — When the purported surety on a bond is a corporation, and its signature is made by one who purports to act as its attorney in fact, the claim is subject to dismissal unless the bond is accompanied by a power of attor-



ney showing the authority of the one purporting to act for the corporation in executing a bond. *Sabin Robbins Paper Co. v. Wilson*, 70 Ga. App. 42, 27 S.E.2d 254 (1943).

**When part of property is found not subject to execution**, verdict for damages on bond is improper. *Burt v. Lorentz & Rittler*, 102 Ga. 121, 29 S.E. 137 (1897).

**Security on claim is bound by judgment for damages and costs.** *Harvey v. Head*, 68 Ga. 247 (1881).

**Surety may control fi. fa. after payment of damages** for the purpose of securing reimbursement from the principal. *Keith v. Welchel*, 9 Ga. 179 (1850).

**Section not applicable to garnishment action.** — This section applies when property has been levied on under process by a sheriff or other officer and impounded, and not in a garnishment

action, since there is no seizure of property under process by an officer. *Bryant v. J. Scott Rentals, Inc.*, 144 Ga. App. 231, 241 S.E.2d 12 (1977).

**Cited in** *Goggins v. Jones*, 115 Ga. 596, 41 S.E. 995 (1902); *Beeland v. Reynolds Banking Co.*, 145 Ga. 839, 90 S.E. 46 (1916); *Few v. Pou*, 32 Ga. App. 620, 124 S.E. 372 (1924); *Brooks v. Goette*, 52 Ga. App. 408, 183 S.E. 633 (1936); *McKenzie v. Bank of Ga.*, 76 Ga. App. 539, 46 S.E.2d 356 (1948); *Gordon v. Commercial Auto Loan Corp.*, 85 Ga. App. 808, 70 S.E.2d 406 (1952); *Associates Disct. Corp. v. Willard*, 99 Ga. App. 116, 108 S.E.2d 110 (1959); *Hardy v. George C. Murdock Freight Lines*, 99 Ga. App. 459, 108 S.E.2d 739 (1959); *General Guar. Ins. Co. v. Land-Wilson Motors*, 112 Ga. App. 337, 145 S.E.2d 119 (1965); *Bankston v. Smith*, 134 Ga. App. 882, 216 S.E.2d 634 (1975).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 295.

**C.J.S.** — 33 C.J.S., Executions, § 315 et seq.

9-13-92. Affidavit of indigence.

In all claim cases where claimants are unable to give bond and security as required in this article, the claimants may file, in addition to the oath required in Code Section 9-13-90, an affidavit as follows:

“I, A.B., do swear that I do not interpose this claim for delay only; that I bona fide claim the right and title to the same; that I am advised and believe that the claim will be sustained; and that because of my indigence I am unable to give bond and security as required by law.”

When the affidavit has been made and delivered to the levying officer, it shall suspend the sale in the same manner as if bond and security had been given. (Ga. L. 1870, p. 411, § 1; Code 1873, § 3733; Code 1882, § 3733; Civil Code 1895, § 4618; Civil Code 1910, § 5164; Code 1933, § 39-807.)

JUDICIAL DECISIONS

**This section provides that a pauper’s affidavit may be given when** the claimant shall be unable to give the bond and security required. *George v.*

*Davison-Paxon Co.*, 90 Ga. App. 717, 84 S.E.2d 122 (1954).

**Affidavit of indigence cannot be filed by claimant’s agent.** *Selma, R. &*



D.R.R. v. Tyson, 48 Ga. 351 (1873); Lester v. Haynes, 80 Ga. 120, 5 S.E. 250 (1887); Hadden v. Larned, 83 Ga. 636, 10 S.E. 278 (1889).

**Claim properly dismissed when neither affidavit of indigence nor bond filed.** — When no damage bond was given as provided in former Code 1882, §§ 3726 and 3729 (see now O.C.G.A. § 9-13-91) nor an affidavit in forma pauperis has been filed under former Code 1882, § 3733 (see now O.C.G.A. § 9-13-92), the claim, on motion made by counsel for the plaintiff in fi. fa. before issue joined, should be dismissed. *Hand v. Frank W. Hall Merchandise Co.*, 91 Ga. 130, 16 S.E. 644 (1893).

If neither the damage bond provided by former Code 1933, § 39-802 (see now O.C.G.A. § 9-13-91) nor the pauper's affi-

davit provided by former Code 1933, § 39-807 (see now O.C.G.A. § 9-13-92) was filed, a motion to dismiss the claim should be sustained. *George v. Davison-Paxon Co.*, 90 Ga. App. 717, 84 S.E.2d 122 (1954).

**Claim cannot be interposed in forma pauperis to property levied on under tax execution** issued by a municipal corporation. Such claims must be made under the provisions of former Code 1882, §§ 896 and 3732 (see now O.C.G.A. § 48-3-24), and did not fall within former Code 1882, § 3733 (see now O.C.G.A. § 9-13-92). *Lingo v. Harris*, 73 Ga. 28 (1884).

**Cited** in *Mincey v. Edwards*, 24 Ga. App. 478, 101 S.E. 305 (1919); *Few v. Pou*, 32 Ga. App. 620, 124 S.E. 372 (1924).

## RESEARCH REFERENCES

**C.J.S.** — 33 C.J.S., Executions, § 336.

**ALR.** — Right to sue or appeal in forma pauperis as dependent on showing of financial disability of attorney or other nonparty or nonapplicant, 11 ALR2d 607.

What costs or fees are contemplated by statute authorizing proceeding in forma pauperis, 98 ALR2d 292.

What constitutes "fees" or "costs" within meaning of Federal Statutory Provision (28 USCS § 1915 and similar predecessor statutes) permitting party to proceed in forma pauperis without prepayment of fees and costs or security therefor, 142 ALR Fed 627.

## 9-13-93. Postponement of sale.

When affidavit and bond have been made and delivered as required in Code Sections 9-13-90 and 9-13-91, it shall be the duty of the sheriff or other levying officer to postpone the sale of the property until otherwise ordered. (Laws 1821, Cobb's 1851 Digest, p. 532; Code 1863, § 3652; Code 1868, § 3677; Code 1873, § 3727; Code 1882, § 3727; Civil Code 1895, § 4613; Civil Code 1910, § 5159; Code 1933, § 39-803.)

## JUDICIAL DECISIONS

**Sheriff will be enjoined from turning land over to buyer when the sheriff refused to postpone sale.** This is especially true when the sheriff announced at the sale that the sheriff refused to accept the claim. *Cook v. Dixon*, 154 Ga. 373, 114 S.E. 429 (1922).

**Pendency of claim deeds do not make it illegal for other judgment creditors to sell land** at a sheriff's sale. *Walker v. Zorn*, 50 Ga. 370 (1873).

**Cited** in *Perkerson v. Overby*, 59 Ga. 414 (1877).



## RESEARCH REFERENCES

C.J.S. — 33 C.J.S., Executions, § 360.

**9-13-94. Forthcoming bond for possession of property; amount and condition; not authorized for realty; when and where recoverable.**

(a) In all cases where a levy is made upon property that is claimed by a third person and the person desires the possession thereof, it shall be the duty of the sheriff or other levying officer to take bond, made payable to the sheriff with good security for a sum equal to double the value of the property levied on to be estimated by the levying officer, for the delivery of the property at the time and place of sale, provided the property so levied upon shall be found subject to the execution. However, it shall not be lawful to require or take a forthcoming bond for real estate.

(b) When bond and security have been given as provided in this Code section, it shall be the duty of the sheriff or other levying officer to leave the property in the possession of the claimant. In the event that the claimant or his security fails to deliver the property after it has been found to be subject to execution, the bond shall be made recoverable in any court having cognizance of the same. (Laws 1811, Cobb's 1851 Digest, p. 532; Laws 1841, Cobb's 1851 Digest, p. 536; Code 1863, §§ 3653, 3654, 3655; Code 1868, §§ 3678, 3679, 3680; Ga. L. 1872, p. 40, § 1; Code 1873, §§ 3728, 3729, 3730; Code 1882, §§ 3728, 3729, 3730; Civil Code 1895, §§ 4614, 4615, 4616; Civil Code 1910, §§ 5160, 5161, 5162; Code 1933, §§ 39-804, 39-805.)

## JUDICIAL DECISIONS

**Purpose of forthcoming bond under this section** is to indemnify levying officer. *Aycock v. Austin*, 87 Ga. 566, 13 S.E. 582 (1891); *Turner v. Camp*, 110 Ga. 631, 36 S.E. 76 (1900).

**Forthcoming bond is privilege to claimant**, and not a requisite with which the claimant must comply. *Bonner v. Little*, 29 Ga. 538 (1859).

**Agent may give forthcoming bond.** When that bond is given the claimant may retain possession. *Phillips v. State ex rel. Saunders*, 15 Ga. 518 (1854).

**Forthcoming bond containing different conditions** from those prescribed by this section is invalid. *King v. Castlen*, 91 Ga. 488, 18 S.E. 313 (1893).

**Bond improperly made payable to plaintiff in fi. fa. is defective** as a

forthcoming bond yet may be good as a common-law obligation. *Wall v. Mount*, 121 Ga. 831, 49 S.E. 778 (1905).

**No attestation or approval of the bond for damages, or forthcoming bond, is necessary** other than acceptance of a properly executed bond by the levying officer. *GMAC v. Allen*, 59 Ga. App. 614, 1 S.E.2d 705 (1939).

**It is no ground for dismissal of claim that forthcoming bonds were not approved** or attested by levying officer, or by anyone else. *GMAC v. Allen*, 59 Ga. App. 614, 1 S.E.2d 705 (1939).

**Before breach of bond, sheriff cannot seize property** and charge the plaintiff in execution with the expense of keeping it. *Houser v. Williams*, 84 Ga. 601, 11 S.E. 129 (1890).



**It is unnecessary to prove personal demand for property** when advertisement was a sufficient notice to the party. *Thompson v. Mapp*, 6 Ga. 260 (1849).

**No advertisement need be shown when claimant refused to deliver property on demand.** *Stinson v. Hall*, 54 Ga. 676 (1875).

**Suit on forthcoming bond brought in plaintiff's name** under this section when the value of the property levied on under the plaintiff's fi. fa. does not exceed the amount of the judgment, the plaintiff in execution has such an interest in a forthcoming bond as authorizes the suit upon the bond to be brought in the plaintiff's name. *Hart v. Thomas & Co.*, 75 Ga. 529 (1885); *Bowman v. Kidd*, 13 Ga. App. 351, 79 S.E. 167 (1913).

**Petition in action on forthcoming bond is not defective in failing to allege** that property in controversy is that of plaintiff in execution, or to attach a copy of execution thereto. *O'Neill Mfg. Co. v. Harris*, 120 Ga. 467, 47 S.E. 934 (1904).

**Invalid defenses to valid bonds. —**

Plea of tender after day of sale is no defense to a valid bond. *Mapp v. Thompson*, 9 Ga. 42 (1850).

Oral promise of sheriff not to require property to be brought to court is no defense to a valid bond. *King v. Castlen*, 91 Ga. 488, 18 S.E. 313 (1893).

Fact that property was given to same officer on bond given in another case is no defense to a valid bond. *Reese v. Worsham & Co.*, 110 Ga. 449, 35 S.E. 680 (1900).

**Jury instructions. —** Jury may be charged that the fact that the forthcoming bond was executed may be a circumstance to determine the value of the property. *Hobbs v. Tindol*, 32 Ga. App. 609, 124 S.E. 112 (1924).

**Cited in** *Wade v. Wortsman*, 29 F. 754 (S.D. Ga. 1887); *Hill v. George*, 47 Ga. App. 272, 170 S.E. 326 (1933); *General Guar. Ins. Co. v. Land-Wilson Motors*, 112 Ga. App. 337, 145 S.E.2d 119 (1965); *A.A. Parker Produce, Inc. v. Mercer*, 221 Ga. 449, 145 S.E.2d 237 (1965); *Seagraves v. Kelley*, 121 Ga. App. 412, 173 S.E.2d 885 (1970).

## RESEARCH REFERENCES

**Am. Jur. 2d. —** 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 209 et seq.

**C.J.S. —** 33 C.J.S., Executions, § 336.

**ALR. —** Right of obligor in action on forthcoming bond or receipt for return of property seized under process to set up title in himself, 37 ALR 1402.

## 9-13-95. Execution of affidavit and bond by partner or joint owner.

One of several partners or persons jointly interested may make the affidavit and execute the bond in the name of the firm or persons jointly interested, who shall be bound thereby as though each individual had signed it himself. (Laws 1838, Cobb's 1851 Digest, p. 589; Code 1863, § 3656; Code 1868, § 3681; Code 1873, § 3731; Code 1882, § 3731; Civil Code 1895, § 4617; Civil Code 1910, § 5163; Code 1933, § 39-806.)

## JUDICIAL DECISIONS

**Member of partnership is authorized to execute claim affidavit in be-**

half of the partnership. *GMAC v. Allen*, 59 Ga. App. 614, 1 S.E.2d 705 (1939).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 12 Am. Jur. 2d, Bonds, §§ 12, 13.      **C.J.S.** — 33 C.J.S., Executions, § 336.

**9-13-96. When plaintiff in execution may give forthcoming bond.**

If the claimant to personal property levied on is unable to give a forthcoming bond, it shall be the privilege of the plaintiff in execution to give the bond, to be approved by the levying officer, and, upon the bond being given and approved, it shall be the duty of the levying officer to deliver the property to the plaintiff. However, in no event shall the plaintiff be allowed any compensation for keeping the property. (Ga. L. 1870, p. 411, § 2; Code 1873, § 3734; Code 1882, § 3734; Civil Code 1895, § 4619; Civil Code 1910, § 5165; Code 1933, § 39-808.)

## JUDICIAL DECISIONS

**Cited** in *Wilson v. Garrick*, 72 Ga. 60 (1884).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 209 et seq.      **C.J.S.** — 33 C.J.S., Executions, § 336.

**9-13-97. Sale of property on claimants' application; order; advertisement; disposition of proceeds.**

In the event the claimant is unable, and the plaintiff neglects or refuses, to give bond for the forthcoming of the property, the claimant may apply to the judge of the probate court and procure an order for the sale of the same; and, when the order has been granted, it shall be the duty of the levying officer to advertise the time and place of sale at not less than three public places, to be selected in different parts of the county in which the sale is to take place, for 15 days immediately preceding the time of sale. On the day of sale, between the hours of 10:00 A.M. and 4:00 P.M., the property shall be sold; and the money arising from the sale shall remain in the hands of the levying officer subject to the order of court upon the final hearing of the claim. (Ga. L. 1870, p. 411, § 3; Code 1873, § 3735; Code 1882, § 3735; Civil Code 1895, § 4620; Civil Code 1910, § 5166; Code 1933, § 39-809.)



## RESEARCH REFERENCES

- C.J.S.** — 33 C.J.S., Executions, § 345 et seq. forthcoming bond or receipt for return of property seized under process to set up title in himself, 37 ALR 1402.
- ALR.** — Right of obligor in action on

### 9-13-98. When and where claim, levy, and execution to be returned.

When an execution issued from a court is levied upon personal property and claimed by a person not a party to the execution, it shall be the duty of the levying officer to return the same, together with the execution, to the next term of the court from which the execution issued. Where an execution is levied upon real property and the same is claimed in the manner aforesaid, it shall be the duty of the officer making the levy to return the same, together with the execution and claim, to the next term of the superior court of the county in which the land so levied upon lies. (Laws 1821, Cobb's 1851 Digest, p. 532; Code 1863, § 3658; Code 1868, § 3683; Code 1873, § 3736; Code 1882, § 3736; Civil Code 1895, § 4621; Civil Code 1910, § 5167; Code 1933, § 39-901.)

## JUDICIAL DECISIONS

**When claim is interposed to person-  
alty**, the claim must be returned to the court which issued the claim. *Bosworth v. Clark*, 62 Ga. 286 (1879).

**When land is divided by county  
line**, the proper court is where the defendant resides. *Fambrough v. Amis ex rel. Fambrrough*, 58 Ga. 519 (1877).

**Plaintiff in fieri facias cannot sue  
on forthcoming bond** when claim is not returned to superior court. *Brannan v. Cheek*, 103 Ga. 353, 29 S.E. 937 (1898).

**Either party may compel sheriff to  
return claim.** *Cottle v. Dodson*, 25 Ga. 633 (1858); *Brannon v. Barnes*, 111 Ga. 850, 36 S.E. 689 (1900).

**Equity will require sheriff to return  
claim** to superior court if the sheriff refused to do so. *Cook v. Dixon*, 154 Ga. 373, 114 S.E. 429 (1922).

**When the sheriff failed to return  
claim for over a year**, the claimant may presume levying abandoned. *Glisson v. Moore*, 12 Ga. App. 291, 77 S.E. 108 (1913).

**Cited in** *Gray v. Riley*, 47 Ga. App. 348, 170 S.E. 537 (1933); *Burt v. Crawford*, 180 Ga. 331, 179 S.E. 82 (1935); *Drillers Serv., Inc. v. Moody*, 242 Ga. 123, 249 S.E.2d 607 (1978).

## RESEARCH REFERENCES

- Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 217 et seq.
- C.J.S.** — 33 C.J.S., Executions, § 510 et seq.



### 9-13-99. Return of claim or illegality against execution from probate court.

Whenever an execution issued from a probate court is levied upon personal property and a claim to the property or an affidavit of illegality is interposed, it shall be the duty of the sheriff or other levying officer to return the same, together with the execution and all the other papers, to the next term of the superior court of the county from which the execution was issued. If the levy has been made upon realty, the execution, with the claim or illegality papers, shall be returned by the levying officer to the next term of the superior court of the county where the land lies and the issue shall be tried as is provided for the trial of claim and illegality cases. (Ga. L. 1876, p. 100, § 1; Code 1882, § 3742a; Civil Code 1895, § 4628; Civil Code 1910, § 5174; Code 1933, § 39-908.)

**Law reviews.** — For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the

resolution of venue questions, see 9 Ga. St. B.J. 254 (1972).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 217 et seq.

**C.J.S.** — 33 C.J.S., Executions, § 288 et seq.

### 9-13-100. Claim to be tried by jury.

The court to which a claim is returned shall cause the right of property to be decided by a jury at the first term thereof, unless continued in the same manner as other cases. (Laws 1821, Cobb's 1851 Digest, pp. 532, 533; Code 1863, § 3660; Code 1868, § 3684; Code 1873, § 3737; Code 1882, § 3737; Civil Code 1895, § 4622; Civil Code 1910, § 5168; Code 1933, § 39-902.)

### JUDICIAL DECISIONS

**Proper disposition of claim is by verdict of jury,** unless withdrawn or dismissed by the claimant. *Hodges v. Holiday*, 29 Ga. 696 (1859).

**Evidence considered by jury in determining ownership at time of levy.** — Purchasing of property, and the exercising of dominion over the property in the way of possession and use prior to the rendition of the judgment is admissible, at least as a circumstance, and the jury may consider this along with all the other

evidence in the case in determining who was the owner of the property at the time of the levy. *Webb v. Biggers*, 71 Ga. App. 90, 30 S.E.2d 59 (1944).

**Cited** in *McNeil v. Harker*, 40 Ga. 26 (1869); *Ladson v. Gaskins*, 30 Ga. App. 676, 118 S.E. 765 (1923); *Callaway v. Life Ins. Co.*, 166 Ga. 818, 144 S.E. 381 (1928); *Burt v. Crawford*, 180 Ga. 331, 179 S.E. 82 (1935); *Jones v. Major*, 80 Ga. App. 223, 55 S.E.2d 846 (1949).



## RESEARCH REFERENCES

C.J.S. — 33 C.J.S., Executions, § 330.

### 9-13-101. Additional oath of jurors; damages and costs when claim made for delay.

Every juror on the trial of the claim of property either real or personal shall be sworn, in addition to the oath usually administered, to give such damages as may seem reasonable and just, in an amount not less than 10 percent of the amount due upon the execution when the value of the property in dispute exceeds the amount of the execution, or of the value of the property when the value of the property is less than the execution levied, to the plaintiff against the claimant in case it shall be shown that the claim was made for delay only. The jury may give a verdict in the manner aforesaid and judgment may be entered thereon against the claimant and his security for the damages so assessed and the costs of the trial. (Laws 1821, Cobb's 1851 Digest, p. 533; Code 1863, § 3661; Code 1868, § 3685; Code 1873, § 3738; Code 1882, § 3738; Civil Code 1895, § 4623; Civil Code 1910, § 5169; Code 1933, § 39-903.)

## JUDICIAL DECISIONS

**When the verdict is for the claimant, failure to administer oath is immaterial.** Hawes v. Smith, 16 Ga. App. 458, 85 S.E. 616 (1915).

**Damages that jury assess may be recovered on bond** given under former Civil Code 1910, §§ 5158 and 5161 (see now O.C.G.A. § 9-13-91). Mutual Fertilizer Co. v. White & Son, 26 Ga. App. 134, 106 S.E. 19, cert. denied, 26 Ga. App. 801 (1921).

**Jury instructions regarding damages for delay.** — Charge in a claim case that if the jury believed that the claim was interposed for delay only, the jury should

award damages to the plaintiff against the claimant, is a correct statement of the law. The charge is not subject to the exception that the charge was incorrect and tended to confuse the jury, to the prejudice of the claimant's case, and that the court in so charging erred in ignoring other phases of the case than that of delay. Nesmith v. Nesmith, 37 Ga. App. 779, 142 S.E. 176 (1928).

**Cited in** Walker v. Walker, 42 Ga. 141 (1871); Baker v. Boozer, 58 Ga. 195 (1877); Traders Ins. Co. v. Mann, 118 Ga. 381, 45 S.E. 426 (1903); Bankston v. Smith, 134 Ga. App. 882, 216 S.E.2d 634 (1975).

## RESEARCH REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d, Jury, § 191 et seq.

C.J.S. — 50A C.J.S., Juries, § 520 et seq.

### 9-13-102. Burden of proof.

Upon the trial of all claims provided for in this article, the burden of proof shall lie upon the plaintiff in execution in all cases where the property levied on is not in possession of the defendant in execution at



the time of the levy. (Laws 1821, Cobb's 1851 Digest, p. 533; Code 1863, § 3662; Code 1868, § 3686; Code 1873, § 3739; Code 1882, § 3739; Civil Code 1895, § 4624; Civil Code 1910, § 5170; Code 1933, § 39-904.)

### JUDICIAL DECISIONS

**This section applies to liens created by rendition of common-law judgment** rather than to those created by security instrument, in which case the lien or title is created as of the time of the execution of the contract. *Exchange Bank v. Slocumb*, 112 Ga. App. 399, 145 S.E.2d 285 (1965).

**This section imposes burden of proof on plaintiff in fieri facias** in all cases when the property levied on is, at the time of such levy, not in possession of the defendant in execution. *Roughton v. Roughton*, 178 Ga. 367, 173 S.E. 673 (1934).

**When the claimant is in possession**, the burden of proof is on the plaintiff in execution. *Southern Mining Co. v. Brown*, 107 Ga. 264, 33 S.E. 73 (1899); *Spraggins v. Brooks*, 154 Ga. 822, 115 S.E. 495 (1923).

When the levy recites that the claimant was in possession of the mortgaged property at the time of the levy, the burden is then on the plaintiff in execution to prove the plaintiff's title. *Tanner v. Tanner*, 52 Ga. App. 460, 183 S.E. 666 (1936).

**If husband of claimant is in possession, burden is on plaintiff.** *Whitley v. Foster*, 132 Ga. 32, 63 S.E. 698 (1909).

**Burden on plaintiff in fieri facias when possession not shown.** — When it does not appear in whose possession the property was found, the burden of proof is upon the plaintiff in fieri facias. *Singer Sewing Mach. Co. v. Crawford*, 34 Ga. App. 719, 131 S.E. 103 (1925).

Burden of proof is upon the plaintiff when entry of levy does not show that the defendant in execution was in possession of the property levied upon; and in such case the plaintiff in execution is entitled to the opening and conclusion of the argument. *Miller v. Clermont Banking Co.*, 180 Ga. 556, 179 S.E. 718 (1935).

When the entry of the officer's levy does not show who was in possession of the

land levied on, the burden is on the plaintiff in fieri facias. *Hicks v. Hicks*, 193 Ga. 382, 18 S.E.2d 763 (1942); *Smith v. Hartrampf*, 105 Ga. App. 40, 123 S.E.2d 417 (1961), later appeal, 106 Ga. App. 603, 127 S.E.2d 814 (1962).

**Shifting of burden to claimant.** — To change the onus under this section from the plaintiff in execution to the claimant in a claim case, the plaintiff must show either title in the defendant in fieri facias, or possession in the defendant since the date of the judgment. *Butt v. Maddox*, 7 Ga. 495 (1849); *Knowles v. Jourdan*, 61 Ga. 300 (1878); *S.T. Coleman & Burden Co. v. Rice*, 105 Ga. 163, 31 S.E. 424 (1898).

**Burden is on claimant when defendant in fieri facias is in possession** to show the claimant's title to the property in defendant's possession. *Jones Motor Co. v. W.R. Finch Motor Co.*, 34 Ga. App. 399, 129 S.E. 915 (1925).

Burden is on the claimant wherever the entry of levy recites that the property claimed was levied on in the possession of the defendant in execution, or the plaintiff offers other evidence to make that proof. *Sealy v. Beeland*, 183 Ga. 709, 189 S.E. 524 (1937).

When the defendant in fieri facias is in possession of the property levied upon, the burden of proof is upon the claimant. *Parker v. Boyd*, 208 Ga. 829, 69 S.E.2d 760 (1952).

**Burden is on claimant when claimant admits title in defendant prior to judgment.** *S.T. Coleman & Burden Co. v. Rice*, 105 Ga. 163, 31 S.E. 424 (1898); *Sealy v. Beeland*, 183 Ga. 709, 189 S.E. 524 (1937).

**Evidence that defendant was in possession prior to judgment** on which execution based will change burden. *Deloach & Wilcoxson v. Myrick*, 6 Ga. 410 (1849); *Morgan v. Sims & Nance*, 26 Ga. 283 (1858).



**Effect of proof of defendant's possession at time of levy.** *Greene v. Mathews*, 31 Ga. App. 265, 120 S.E. 434 (1923).

Evidence of entry on levy or other proof that the property was levied on in the possession of the defendant places the burden on the claimant to prove the claimant's claim. *Smith v. Hartrampf*, 105 Ga. App. 40, 123 S.E.2d 417 (1961), later appealed, 106 Ga. App. 603, 127 S.E.2d 814 (1962).

**Effect of nonappearance of claimant.** — When the claimant fails to appear, the plaintiff may take a verdict upon proof of possession of the defendant. An entry of this fact on the execution is sufficient. *Bank of S.W. Ga. v. Empire Life Ins. Co.*, 10 Ga. App. 320, 73 S.E. 597 (1912).

**It is duty of plaintiff in fieri facias to prove**, prima facie at least, that property levied upon is property of the defendant in fieri facias; and in a contest between the plaintiff in fieri facias and the claimant, the sheriff's entry of levy does not disclose that the property levied upon was in the possession of the defendant in fieri facias at the time of levy, it devolves upon the plaintiff in fieri facias to show, if the plaintiff can, by proper proof aliunde that the defendant was in possession. *Jarrard v. Mobley*, 170 Ga. 847, 154 S.E. 251 (1930).

**Entry of levy showing defendant in possession.** — Recital in entry of levy that the defendant was in possession at the time of levy makes a prima facie case in favor of the plaintiff in execution on an issue raised by the claim interposed. *Thompson v. Vanderbilt*, 166 Ga. 132, 142 S.E. 665 (1928).

When in a claim case the plaintiff in an ordinary fieri facias introduces in evidence the execution, with entry of levy showing that the defendant in execution was in possession of the property at the date of the levy, such evidence makes a prima facie case in favor of the plaintiff in fieri facias. *Veal v. Veal*, 192 Ga. 503, 15 S.E.2d 725 (1941).

Execution, with the entry of the levying officer reciting that the officer levied on the property in possession of the defendant in fieri facias, makes out a prima facie case in favor of the plaintiff in fieri

facias. *Smith v. Hartrampf*, 105 Ga. App. 40, 123 S.E.2d 417 (1961), later appeal, 106 Ga. App. 603, 127 S.E.2d 814 (1962).

**Proof of possession in defendant after rendition of judgment** will raise presumption of title in defendant and require a finding in favor of the plaintiff in fieri facias, in the absence of rebutting evidence. *Roughton v. Roughton*, 178 Ga. 367, 173 S.E. 673 (1934).

**Failure to timely request burden of proof instruction.** — In absence of timely request, it is not error because judge omitted instruction on burden of proof. *Watson v. Sudderth*, 32 Ga. App. 383, 123 S.E. 143 (1924).

**Property levied upon in possession of defendant.** — It was error to charge jury that burden of proof rests upon the plaintiff if property was levied on in possession of the defendant in execution, and that otherwise, the burden of proof rests upon the claimant; when the plaintiff in fieri facias introduced the execution with the return of the officer showing the property levied on in the possession of the defendant in fieri facias at the time of the levy, the burden was then upon the claimant to show the claimant's title. *N. Seligman & Co. v. Daniels*, 61 Ga. App. 643, 7 S.E.2d 207 (1940).

**Plaintiff has burden when claimant in possession of mortgaged property.** — When it appears from the levy in a claim case that the mortgaged property was in the possession of the claimant at the time of the levy, the burden is on the plaintiff in execution to prove title to the property in the mortgagor or defendant in execution at the time of the execution of the mortgage, or to prove possession in the mortgagor at the time, and when this is done the claimant is put upon an exhibition of the claimant's title. *Tanner v. Tanner*, 52 Ga. App. 460, 183 S.E. 666 (1936).

When mortgaged property is levied on under a mortgage fieri facias, and a claim is filed, the plaintiff in fieri facias must prove title to the property in the mortgagor at the date of the mortgage, or make out a prima facie case by proof of possession in the mortgagor at that time, before the claimant is put to an exhibition of the claimant's title. *Tanner v. Tanner*, 52 Ga. App. 460, 183 S.E. 666 (1936).



**Evidence showing defendant husband in support case died in possession of property.** — When an execution is based on a judgment for year's support and is levied on the land as property of the deceased husband, and it is made to appear from the evidence that the husband claimed the property as his own, was in possession of the property for many years, and died in possession, a prima facie case is made out and the burden shifts from the plaintiff in fieri facias, and it is then incumbent upon the claimants to establish the claimants' title. *Hicks v. Hicks*, 193 Ga. 382, 18 S.E.2d 763 (1942).

**Proof that defendant had title when the defendant made security deed to plaintiff** is sufficient to make prima facie case against the claimant in favor of the plaintiff in fieri facias, notwithstanding that the entry of levy stated the claimant was in possession at the time of the levy. *Heaton v. Hayes*, 188 Ga. 632, 4 S.E.2d 570 (1939).

**Estoppel from objecting to incorrect imposition of burden.** — Since the burden of proof may have been upon the plaintiff in a suit to foreclose upon a bill of sale, under the provisions of this section, if it does not appear that a claimant to the chattel made or urged any objection to the ruling of the court placing the burden of proof upon the claimant at the time such ruling was made, it is too late after judg-

ment for the plaintiff for the claimant's counsel to interpose an objection. *Gravitt v. Employees Loan & Thrift Corp.*, 75 Ga. App. 561, 44 S.E.2d 159 (1947).

**Cited in** *First Nat'l Bank v. Spicer*, 10 Ga. App. 503, 73 S.E. 753 (1912); *Blount v. Dunlap*, 34 Ga. App. 666, 130 S.E. 693 (1925); *Peterson v. Wilbanks*, 163 Ga. 742, 137 S.E. 69 (1927); *Scruggs v. Blackshear Mfg. Co.*, 45 Ga. App. 855, 166 S.E. 249 (1932); *Downs v. Brandon*, 49 Ga. App. 198, 174 S.E. 647 (1934); *Foremost Dairies, Inc. v. Kelley*, 51 Ga. App. 722, 181 S.E. 204 (1935); *Johnson v. Sherrer*, 185 Ga. 340, 195 S.E. 149 (1938); *Baldwin v. Davis*, 188 Ga. 587, 4 S.E.2d 458 (1939); *Heaton v. Hayes*, 188 Ga. 632, 4 S.E.2d 570 (1939); *Krasner v. Croswell*, 76 Ga. App. 421, 46 S.E.2d 207 (1948); *Ayares Small Loan Co. v. Maston*, 78 Ga. App. 628, 51 S.E.2d 699 (1949); *Jones v. Major*, 80 Ga. App. 223, 55 S.E.2d 846 (1949); *Whitlock v. Michael*, 206 Ga. 749, 58 S.E.2d 833 (1950); *Jones v. Major*, 83 Ga. App. 78, 62 S.E.2d 729 (1950); *Yancey Bros. Co. v. Caldwell*, 93 Ga. App. 445, 91 S.E.2d 837 (1956); *Dillard v. Jackson's Atlanta Ready Mix Concrete Co.*, 105 Ga. App. 607, 125 S.E.2d 656 (1962); *Gresham v. O'Rear*, 109 Ga. App. 711, 137 S.E.2d 395 (1964); *Germaine v. Webster's Shopping Ctr., Inc.*, 116 Ga. App. 547, 158 S.E.2d 682 (1967); *Swanson v. Universal Promotions, Inc.*, 144 Ga. App. 591, 241 S.E.2d 474 (1978).

## RESEARCH REFERENCES

**C.J.S.** — 33 C.J.S., Executions, § 236.

### 9-13-103. Withdrawal or discontinuance of claim limited.

Whenever a claim of property is made in terms of this article and is returned to the proper court by the sheriff or other levying officer, the claimant shall not be permitted to withdraw or discontinue his claim more than once without the consent of the plaintiff in execution or some person duly authorized to represent the plaintiff; rather, the court shall proceed to the trial of the claim of the property and it shall be the duty of the jury to assess damages accordingly. (Laws 1821, Cobb's 1851 Digest, p. 533; Code 1863, § 3663; Code 1868, § 3687; Code 1873, § 3740; Code 1882, § 3740; Civil Code 1895, § 4625; Civil Code 1910, § 5171; Code 1933, § 39-905.)



## JUDICIAL DECISIONS

**Claim may be withdrawn once without consent of plaintiff in execution.** *Mize v. Ells*, 22 Ga. 565 (1857).

**Claimant may not more than one time voluntarily dismiss claimant's claim and interpose another.** *Burt v. Crawford*, 180 Ga. 331, 179 S.E. 82 (1935).

**Withdrawal of first claim terminates suit.** *Rucker v. Womack*, 55 Ga. 399 (1875).

**After return of verdict, it is too late to withdraw claim.** *Houser v. Brown*, 60 Ga. 366 (1878).

**If there has been no verdict the claimant may withdraw** the claimant's claim, although the case be on appeal. *Attaway v. Dyer*, 8 Ga. 184 (1850); *Renneker & Glover v. McMichael*, 33 Ga. 94 (1861).

**Withdrawal of second claim not matter of right.** — Claimant who has once withdrawn the claimant's claim, and afterwards interposed a second claim to the same levy, cannot again withdraw the

claim as a matter of right. *Hart v. Thomas & Co.*, 61 Ga. 470 (1878); *Brady v. Brady*, 68 Ga. 831 (1882).

**Appeal after withdrawal.** — Claimant who, pending the trial of the claimant's case, before verdict, voluntarily withdraws the claimant's claim upon the court, cannot afterwards appeal any decision of the court made prior to such withdrawal. *Macrea v. Nolan*, 33 Ga. 205 (1862).

**Upon withdrawal or dismissal of claim, forthcoming bond continues in force** throughout the whole litigation, whether a second claim is filed or not. *Houser v. Williams*, 84 Ga. 601, 11 S.E. 129 (1890).

**Cited in** *Council v. Stevens*, 19 Ga. App. 250, 91 S.E. 286 (1917); *Burt v. Crawford*, 180 Ga. 331, 179 S.E. 82 (1935); *James Talcott, Inc. v. Swim-A-Rama Pool & Equip. Co.*, 112 Ga. App. 61, 143 S.E.2d 677 (1965).

## RESEARCH REFERENCES

**C.J.S.** — 33 C.J.S., Executions, §§ 132, 133, 341.

### 9-13-104. Trial of damage issue where claim dismissed or withdrawn.

Whenever a claim is dismissed for insufficiency or is withdrawn, the plaintiff in execution may have a case made up and submitted to the jury charging that the claim was filed for the purpose of delay. Upon proof of the same, defendant and claimant having the same power to resist the case as in claim cases where damages are claimed, the jury, under instructions from the court, may give damages as in cases where the claim is not withdrawn but is submitted for trial to the jury. The cases so submitted shall be tried at the time of the disposal of the claim if the parties are ready, but continuances shall be granted as in other cases. (Ga. L. 1871-72, p. 52, § 1; Code 1873, § 3741; Code 1882, § 3741; Civil Code 1895, § 4626; Civil Code 1910, § 5172; Code 1933, § 39-906.)

## JUDICIAL DECISIONS

**Withdrawal of claim is suggestion of delay.** *National Exch. Bank v. Walker*, 80 Ga. 281, 4 S.E. 763 (1887).



**Formal pleading not necessary.** — In a case under this section, it is enough that a plain issue charging that the claim was interposed for delay only be tendered, and no formal pleading is necessary, especially if no objection is made to it before or at the trial. *Shealy v. Toole*, 62 Ga. 170 (1878).

**Burden of proving that claim is filed for delay only** rests upon the plaintiff in execution. *Dobbs Lumber Co. v. Appling*, 97 Ga. 375, 24 S.E. 441 (1895).

**When claim was dismissed for insufficiency**, the plaintiff was entitled to proceed at once with a claim for damages in the absence of some valid reason for a

continuance or postponement. *Franklin v. Mobley*, 202 Ga. 212, 42 S.E.2d 755 (1947).

**When administrator named specific amount of damages from claim**, the administrator could not recover more. *Rexford v. Bleckley*, 131 Ga. 678, 63 S.E. 337 (1908); *Crawford v. Crawford*, 139 Ga. 68, 76 S.E. 564 (1912).

**Cited** in *Mercer v. Baldwin*, 85 Ga. 651, 11 S.E. 846 (1890); *Shelnutt v. Whitesburg Banking Co.*, 141 Ga. 678, 81 S.E. 1106 (1914); *McDaniel v. Norris*, 80 Ga. App. 734, 57 S.E.2d 299 (1950); *Bankston v. Smith*, 134 Ga. App. 882, 216 S.E.2d 634 (1975).

### RESEARCH REFERENCES

**C.J.S.** — 25A C.J.S., Damages, § 393.

### 9-13-105. How damages assessed.

Upon the trial of claims to property which may be pending in the court, when damages are found by the jury, the damages shall be assessed upon the whole amount then due upon the execution when the value of the property in dispute exceeds the amount of the execution and upon the value of the property when the value of the property is less than the execution levied. (Laws 1821, Cobb's 1851 Digest, p. 534; Code 1863, § 3664; Code 1868, § 3688; Code 1873, § 3742; Code 1882, § 3742; Civil Code 1895, § 4627; Civil Code 1910, § 5173; Code 1933, § 39-907.)

### JUDICIAL DECISIONS

**Cited** in *Houser v. Brown*, 60 Ga. 366 (1878); *Adams v. Carnes*, 111 Ga. 505, 36 S.E. 597 (1900); *Mutual Fertilizer Co. v. White & Son*, 26 Ga. App. 234, 106 S.E. 19

(1921); *O'Leary v. Costello*, 169 Ga. 754, 151 S.E. 487 (1930); *Gordon v. Commercial Auto Loan Corp.*, 85 Ga. App. 808, 70 S.E.2d 406 (1952).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 22 Am. Jur. 2d, Damages, § 473 et seq.

**C.J.S.** — 25 C.J.S., Damages, § 118 et seq.

### 9-13-106. Withdrawal of original execution and filing of copy.

The plaintiff in execution in all claim cases shall have the right to withdraw the original execution from the files of the court by making application therefor, in person or by attorney, to the clerk of the court if there is a clerk or to the court if there is no clerk. Upon application



being made, the clerk or court shall make a true copy of the execution with all the entries thereon and shall certify the same to be true, which certified copy shall be filed with the claim papers in lieu of the original execution; and an entry of the filing shall be made thereon. (Ga. L. 1887, p. 62, § 1; Civil Code 1895, § 4629; Civil Code 1910, § 5175; Code 1933, § 39-909.)

### JUDICIAL DECISIONS

**Plaintiff in execution in claim case may lawfully withdraw fieri facias** from the files of the court without an order from the judge granting leave so to do, on application to the clerk or presiding judge.

*Bird v. Burgsteiner*, 108 Ga. 654, 34 S.E. 183 (1899).

**Cited** in *Porter Fertilizer Co. v. Cox*, 169 Ga. 391, 150 S.E. 582 (1929).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, §§ 70, 90.

**C.J.S.** — 33 C.J.S., Executions, §§ 15, 16.

## ARTICLE 6

### ILLEGALITY

#### 9-13-120. Affidavit of illegality — When authorized; bond and security.

When an execution against the property of any person issues illegally, or is proceeding illegally, and the execution is levied on such property, the person may make oath in writing, stating the cause of the illegality, and deliver the same to the sheriff or other executing officer together with bond and good security for the forthcoming of the property, as provided by this article. (Laws 1799, Cobb's 1851 Digest, p. 509; Laws 1838, Cobb's 1851 Digest, p. 514; Code 1863, § 3591; Code 1868, § 3614; Code 1873, § 3664; Code 1882, § 3664; Civil Code 1895, § 4736; Civil Code 1910, § 5305; Code 1933, § 39-1001.)

**Law reviews.** — For note discussing legal and equitable relief from execution

available to debtors, see 12 Ga. L. Rev. 814 (1978).

### JUDICIAL DECISIONS

**Former Code 1933, § 39-1001 et seq. (see now O.C.G.A. Art. 6, Ch. 13, T. 9) sets out how illegalities shall be filed and tried**, but Ga. L. 1962, p. 609, § 1 et seq. (see now O.C.G.A. Ch. 11, T. 9) applied when the proceeding was filed and issue joined in the superior court.

*Whitehurst v. Universal C.I.T. Credit Corp.*, 131 Ga. App. 202, 205 S.E.2d 489 (1974).

**This section provides remedy whenever execution may be proceeding illegally**, though it issued legally. *Robison v. Banks*, 17 Ga. 211 (1855).



Word "issue" in this section has sense of word "proceed." *Robison v. Banks*, 17 Ga. 211 (1855).

**Degree of specificity required.** — This section does not require that "the cause of the illegality" shall be stated in detail, or that the specific facts upon which the cause may be based shall be given. *Dixon v. Mayor of Savannah*, 20 Ga. App. 511, 93 S.E. 274 (1917).

**Purpose and only office of affidavit of illegality** is to arrest executions illegally proceeding against the property of a defendant in fieri facias; and being purely statutory, it affords no remedy except such as the statute provides. *Tanner v. Wilson*, 183 Ga. App. 53, 187 S.E. 625 (1936); *Hamilton v. Hamilton*, 80 Ga. App. 750, 57 S.E.2d 301 (1950).

**Provisions for affidavits of illegality are purely statutory** and cannot be employed unless right is specifically given by statute. *Georgia Power Co. v. Selman*, 87 Ga. App. 323, 73 S.E.2d 597 (1952).

**Affidavit of illegality is proper defensive remedy to attack void judgment.** *Walker v. Tate*, 47 Ga. App. 340, 170 S.E. 403 (1933).

**Title to property levied upon is not involved in illegality proceedings.** *Harris v. Woodard*, 133 Ga. 104, 65 S.E. 250 (1909); *Ragan v. Smith*, 49 Ga. App. 118, 174 S.E. 180 (1934).

**To what judgments affidavit applicable.** — Remedy by affidavit of illegality applies only to the arrest of executions based upon judgments of courts, and not to the arrest of executions issued ex parte by some ministerial officer as a city clerk. *Hill v. DeLaunay*, 34 Ga. 427 (1866); *Manning v. Phillips*, 65 Ga. 548 (1880); *City of Atlanta v. Jacobs*, 125 Ga. 523, 54 S.E. 534 (1906); *Cochran v. Whitworth*, 21 Ga. App. 406, 94 S.E. 609 (1917); *Cook & Kimbrell v. City of Colquitt*, 29 Ga. App. 494, 116 S.E. 37 (1923); *Georgia Power Co. v. Selman*, 87 Ga. App. 323, 73 S.E.2d 597 (1952).

**Affidavit of illegality lies only in favor of defendants in execution.** *Artope v. Barker*, 72 Ga. 186 (1883); *State v. Sallade*, 111 Ga. 700, 36 S.E. 922 (1900); *Ragan v. Smith*, 49 Ga. App. 118, 174 S.E. 180 (1934).

**If an affidavit is filed by one who is not a defendant but claims owner-**

**ship**, the affidavit will be dismissed. In such a case, a claim may properly be interposed by the party claiming title to the property levied upon. *Ragan v. Smith*, 49 Ga. App. 118, 174 S.E. 180 (1934).

**Owner of property cannot file affidavit if execution is issued against someone else** alleged to be the owner of the property. *City of Atlanta v. Seaboard Air-Line Ry.*, 137 Ga. 805, 74 S.E. 268 (1912).

One cannot file an affidavit of illegality to a levy on another's property. *H-J Enters. v. Bennett*, 118 Ga. App. 179, 162 S.E.2d 838 (1968).

**When appellees are partners in the business levied upon** and only one of the partners is liable only the latter could file affidavit of illegality; the two other partners would have to file their own separate claim suits. *Fowler v. Stansell*, 221 Ga. 630, 146 S.E.2d 726 (1966).

**Right to file affidavit of illegality does not include right to go behind judgment**, contrary to former Civil Code 1910, § 5311 (see now O.C.G.A. § 9-13-121). *Childs v. State Bank*, 31 Ga. App. 533, 121 S.E. 254 (1924).

**Affidavit of illegality must be sworn to.** *Howland v. Donehoo*, 141 Ga. 687, 82 S.E. 32 (1914).

**Affidavit properly dismissed when not verified or signed.** — When the affidavit of illegality was not verified or signed by the person against whom the execution issued, as required by this section, the affidavit was a nullity and the court did not err in dismissing the affidavit on motion. *Burgess v. Calhoun Nat'l Bank*, 28 Ga. App. 534, 112 S.E. 292 (1922); *Goodwyn v. Bennett*, 41 Ga. App. 285, 152 S.E. 605 (1930).

**Sufficiency of oath.** — Oath qualified by the words, "to the best of his knowledge and belief," is not sufficient. This section contemplates a positive affidavit. *Sprinz v. Vannucki*, 80 Ga. 774, 6 S.E. 816 (1888); *Winn v. Miller*, 136 Ga. 388, 71 S.E. 658 (1911).

**Affidavits are to be strictly construed** against the affiant. *Wactor v. Marshall*, 102 Ga. 746, 29 S.E. 703 (1897).

**Affiant may be required to make brief of grounds taken in affidavit**, but material omissions may be proved by



other evidence. *Shorter v. Moore, Trimble & Co.*, 41 Ga. 691 (1871).

**Affidavit of illegality must distinctly present matter relied upon**, so that, if not denied, the court may pass judgment intelligently, or if denied, the jury may have distinctly before the jury the matter in issue. *Sharpe v. Kennedy*, 50 Ga. 208 (1873).

**Grounds for affidavit must allege facts showing** that execution has been issued or is proceeding illegally. *Tanner v. Wilson*, 183 Ga. 53, 187 S.E. 625 (1936).

**Affidavit of illegality may bring up any good reason** why it will be illegal to raise money. *Davis v. Conley*, 53 Ga. App. 259, 185 S.E. 526 (1936).

**Defense of part payment must allege** when and to whom such payments were made. *Terry v. Bank of Americus*, 77 Ga. 528, 3 S.E. 154 (1886); *Smith v. Tokio Marine Ins. Co.*, 31 Ga. App. 631, 121 S.E. 846 (1924).

**Proper method to attack judgment for lack of service.** — Affidavit of illegality is a proper method of attack on a judgment when the defendant claims lack of service. *Rawlins v. Busbee*, 169 Ga. App. 658, 315 S.E.2d 1 (1984).

**Alleging want of service as cause of illegality.** — On an affidavit of illegality, attacking a judgment by a court of general jurisdiction as void for want of service, it is necessary not only for the defendant to show affirmatively that the defendant has not been served, but that the defendant has not waived service by appearance, pleading, or otherwise, since all presumptions are in favor of the regularity of that judgment; however, the rule is different if there is a recital in the judgment showing affirmatively that the return of service made by the sheriff was the only basis of jurisdiction of the court over the person of the defendant. *Green v. Spires*, 189 Ga. 719, 7 S.E.2d 246 (1940).

**Sufficiency of stated cause of illegality.** — When levying officer's entry of levy on an execution describes the property levied on and recites that it was levied on as the property of the defendant and was found in the defendant's possession, an affidavit of illegality to arrest the levy, filed by the defendant in execution, which contains an identical description of

the property as described in the execution, and recites that the execution has been levied on the property and is proceeding illegally, is not defective because of a failure of the defendant to allege specifically that the property levied on belonged to the defendant. *Oliver v. Rutland*, 48 Ga. App. 326, 172 S.E. 660 (1934).

Affidavit of illegality which alleges that the property involved is not covered by a security agreement or by any court order meets the requirements of this section that the affiant state the cause of such illegality. *Riviera Equip., Inc. v. Omega Equip. Corp.*, 147 Ga. App. 412, 249 S.E.2d 133 (1978).

**When affidavit of illegality has been filed, execution itself becomes part of record** in the case, and necessarily with it the entries which are thereon written. *Dever v. Akin*, 40 Ga. 423 (1869); *Wactor v. Marshall*, 102 Ga. 746, 29 S.E. 703 (1897).

**Identifying premises by reference to levy.** — Affidavit of illegality which does not otherwise identify the premises levied upon than by reference to the levy is sufficient. *Wactor v. Marshall*, 102 Ga. 746, 29 S.E. 703 (1897).

**Court improperly overruled motion for new trial when want of service shown.** — When it was admitted that there was no return of service whatever before the judgment was rendered and an execution levied on property of the defendant, who filed an affidavit of illegality on the grounds that the defendant was not served with process or other notice of the suit out of which the execution issued, and that the defendant did not waive service or appear in or defend the suit, and when, after the judgment was rendered, an entry of service nunc pro tunc was made by the officer and judgment was rendered against the affidavit of illegality, the court erred in overruling the defendant's motion for new trial. *Elliott v. Porch*, 59 Ga. App. 181, 200 S.E. 190 (1938).

**Interposition when judgment has been fully satisfied by payment.** — Affidavit of illegality may be interposed when judgment has been fully satisfied by payment. *Bosson v. Bosson*, 117 Ga. App. 629, 161 S.E.2d 433 (1968).

**Article applicable to affidavit filed in proceedings for foreclosure on per-**



**sonalty.** — Affidavit of illegality filed by a defendant in foreclosure proceeding under former Code 1933, § 67-701 (see now O.C.G.A. § 44-14-230) must be considered in the manner prescribed by former Code 1933, § 39-1001 et seq. (see now O.C.G.A. Art. 6, Ch. 13, T. 9). *Riviera Equip., Inc. v. Omega Equip. Corp.*, 147 Ga. App. 412, 249 S.E.2d 133 (1978).

**Execution issued upon award of appraisers in condemnation proceeding** may not be arrested by affidavit of illegality. *Georgia Power Co. v. Selman*, 87 Ga. App. 323, 73 S.E.2d 597 (1952).

**Errors in advertisement of property levied on** cannot properly be made ground of affidavit of illegality, but the party suffering thereby will be remitted to a remedy against the officer. *Fitzgerald Granitoid Co. v. Alpha Portland Cement Co.*, 15 Ga. App. 174, 82 S.E. 774 (1914); *Walker v. Tate*, 47 Ga. App. 340, 170 S.E. 403 (1933); *Felker v. Johnson*, 189 Ga. 797, 7 S.E.2d 668 (1940).

**Defendant's discharge in bankruptcy is no ground of illegality** to levy on judgment for plaintiff in trover. *Barnes v. Moseley*, 41 Ga. App. 713, 154 S.E. 388 (1930).

**Pending motion in arrest of judgment** does not of itself afford a ground for an affidavit of illegality. *Walker v. Tate*, 47 Ga. App. 340, 170 S.E. 403 (1933).

**Levy of executions for state and county taxes.** — There is no statutory provision for contesting levy of executions for state and county taxes issued by tax collector of a county, and the levy of such an execution cannot be arrested by affidavit of illegality. *Means v. Myrick*, 46 Ga. App. 263, 167 S.E. 323 (1933); *Atkinson v. Fitzgerald*, 46 Ga. App. 264, 167 S.E. 340 (1933).

Affidavit of illegality is not available to arrest levy of tax execution made for benefit of transferee thereof. *Means v. Myrick*, 46 Ga. App. 263, 167 S.E. 323 (1933); *Atkinson v. Fitzgerald*, 46 Ga. App. 264, 167 S.E. 340 (1933).

As to county tax executions, the remedy of affidavit of illegality is not available. *City of Carrollton v. Word*, 215 Ga. 104, 109 S.E.2d 37 (1959).

**Adequate remedy precludes enjoining levy.** — Petition does not lie to enjoin levy when the defendant in execution has adequate remedy by illegality. *Hitchcock v. Culver*, 107 Ga. 184, 33 S.E. 35 (1899); *Grading, Inc. v. Cook*, 211 Ga. 749, 88 S.E.2d 364 (1955).

**City tax execution not enjoined when affidavit of illegality authorized by city charter.** — When the remedy of affidavit of illegality to test the validity of city tax executions was expressly provided in the city charter, which is an adequate remedy at law, equity had no jurisdiction to enjoin such tax executions or assessments and the petition by taxpayers seeking such equitable relief was not maintainable. *City of Carrollton v. Word*, 215 Ga. 104, 109 S.E.2d 37 (1959).

**Affidavit of illegality does not have to be accompanied by bond unless** the defendant desires to maintain possession of the property. *Riviera Equip., Inc. v. Omega Equip. Corp.*, 147 Ga. App. 412, 249 S.E.2d 133 (1978).

**Cited in** *Horne v. Spivey*, 44 Ga. 616 (1872); *Manning v. Phillips*, 65 Ga. 548 (1880); *Mitchell v. Cooper*, 73 Ga. 796 (1884); *Gregory & Bro. v. Hendricks*, 12 Ga. App. 486, 77 S.E. 585 (1913); *Howland v. Donehoo*, 141 Ga. 687, 82 S.E. 32, 1917B L.R.A. 513 (1914); *Rawlings v. Brown*, 15 Ga. App. 162, 82 S.E. 803 (1914); *Dixon v. Mayor of Savannah*, 20 Ga. App. 511, 93 S.E. 274 (1917); *Felker v. Johnson*, 189 Ga. 797, 7 S.E.2d 668 (1940); *Huling v. Huling*, 194 Ga. 819, 22 S.E.2d 832 (1942); *McClenton v. Wetherington*, 89 Ga. App. 61, 78 S.E.2d 550 (1953); *Powell v. Powell*, 95 Ga. App. 122, 97 S.E.2d 193 (1957); *Iannicelli v. Iannicelli*, 169 Ga. App. 155, 311 S.E.2d 850 (1983); *Holloway v. State*, 178 Ga. App. 141, 342 S.E.2d 363 (1986); *Hunt v. Lee*, 199 Ga. App. 130, 404 S.E.2d 446 (1991).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 269 et seq.

**C.J.S.** — 33 C.J.S., Executions, § 288 et seq.

**ALR.** — Inadequacy of legal remedy as basis for equitable relief from levy of execution, 171 ALR 221.

### 9-13-121. Affidavit of illegality — To show lack of service; not available to go behind judgment.

If the defendant was not served and did not appear, he may take advantage of the defect by affidavit of illegality. However, if he has had his day in court, he may not go behind the judgment by an affidavit of illegality. (Orig. Code 1863, § 3597; Code 1868, § 3621; Code 1873, § 3671; Code 1882, § 3671; Civil Code 1895, § 4742; Civil Code 1910, § 5311; Code 1933, § 39-1009.)

## JUDICIAL DECISIONS

**Defendant cannot go behind judgment by affidavit of illegality.** Fitzgerald Granitoid Co. v. Alpha Portland Cement Co., 15 Ga. App. 174, 82 S.E. 774 (1914).

**When there has been no service, affidavit of illegality will lie.** Parker v. Jennings, 26 Ga. 140 (1858); Duke v. Randolph, 52 Ga. 523 (1874); Dozier v. Lamb, 59 Ga. 461 (1877).

If the defendant has not been served, and does not appear, the defendant may take advantage of the defect by affidavit of illegality. Courson v. Manufacturers' Fin. Acceptance Corp., 41 Ga. App. 551, 153 S.E. 624 (1930).

When there is no service, nor acknowledgment or waiver thereof, and no appearance by the defendant, the judgment is a nullity, and the defendant can take advantage thereof by an affidavit of illegality. Robinson v. T.A. Bryson & Sons, 45 Ga. App. 440, 165 S.E. 158 (1932).

**Defendant against whom judgment is rendered after due service** has had, in legal contemplation, the defendant's "day in court" and cannot go behind the judgment by affidavit of illegality. Fitzgerald Granitoid Co. v. Alpha Portland Cement Co., 15 Ga. App. 174, 82 S.E. 774 (1914); Courson v. Manufacturers' Fin. Acceptance Corp., 41 Ga. App. 551,

153 S.E. 624 (1930); Nix v. Baxter, 46 Ga. App. 153, 167 S.E. 115 (1932).

**If the defendant has acknowledged service and waived further service,** the defendant has had the defendant's "day in court"; this is true irrespective of what induced the defendant to waive further service. Ray v. Hixon, 107 Ga. 768, 33 S.E. 692 (1899).

**When even with actual service court would have no jurisdiction,** the defendant has not had the defendant's day in court. Rhodes v. Southern Flour & Grain Co., 45 Ga. App. 13, 163 S.E. 237 (1932), later appeal, 49 Ga. App. 517, 176 S.E. 121 (1934).

**Defendant in making an affidavit must negative existence of service.** Georgia N. Ry. v. Home Mercantile Co., 17 Ga. App. 755, 88 S.E. 413 (1916).

**Defendant is not obliged to make any mention of return of service.** See Dozier v. Lamb, 59 Ga. 461 (1877).

**It is necessary for defendant to show affirmatively that the defendant has not waived service** by appearance, pleading, or otherwise since all presumptions are in favor of the regularity of that judgment; however, the rule is different if there is a recital in the judgment showing affirmatively that the return of service made by the sheriff was the only



basis of jurisdiction of the court over the person of the defendant. *Green v. Spires*, 189 Ga. 719, 7 S.E.2d 246 (1940).

**Defendant should swear that the defendant did not appear in the case and have the defendant's day in court** before the rendition of the judgment against the defendant. *Cobb v. Pitman*, 49 Ga. 578 (1873).

**Affidavit of illegality proper mode to attack void judgments.** — When the judgment is not merely voidable, but wholly void, as when the court was entirely and under all circumstances without jurisdiction, or when service on the defendant was never effected or waived, nor appearance made, affidavit of illegality is a proper mode of attacking an execution issued under the judgment so obtained. *Cochran v. Whitworth*, 21 Ga. App. 406, 94 S.E. 609 (1917); *Ivey v. Kerce*, 42 Ga. App. 336, 156 S.E. 239 (1930).

**Unless judgment is absolutely void**, affidavit of illegality is never proper method to attack the judgment. *Mason v. Fisher*, 143 Ga. App. 573, 239 S.E.2d 226 (1977).

**Judgment is not invalid in that judgment was rendered in absence of evidence** having been adduced upon the trial. *Sikes v. Bird*, 52 Ga. App. 654, 183 S.E. 825 (1936).

**Judgment is not invalid merely because judgment was rendered in absence of one and one's counsel**, although their absence was caused by a statement to them by the judge, on the day when the case was expected to be tried, that the court had closed for the day and the case would not be tried that day, but would stand for trial at the next term of court, and when the judge later in the day, without the knowledge of the party or the party's counsel and in their absence, called the case for trial and rendered judgment. *Sikes v. Bird*, 52 Ga. App. 654, 183 S.E. 825 (1936).

**Judgment rendered without jurisdiction over nonresident defendants.** — After a suit was brought against three separate defendants, alleging their residence in three separate counties, and second originals were served upon the two nonresident defendants, and when the resident defendant filed a plea, denying

that the resident defendant was ever liable to the plaintiff in any sum, upon which plea the jury found a verdict in that defendant's favor, the court could not proceed to judgment against the two nonresident defendants merely because they had been served with second originals and had failed to file a defense because in such a case it is apparent from the face of the record that the court is without jurisdiction to render judgment against the nonresident defendants, and a judgment so rendered, though by default, is absolutely void and may be attacked by affidavit of illegality. *Rhodes v. Southern Flour & Grain Co.*, 45 Ga. App. 13, 163 S.E. 237 (1932), later appeal, 49 Ga. App. 517, 176 S.E. 121 (1934).

**Judgment when service valid though venue improper.** — When there has been an apparently valid service upon a suit which indicates that with service the court has jurisdiction of the defendant's person, the defendant cannot attack the judgment by affidavit of illegality, even though because of the defendant's residence in another county the defendant should not have been sued in the county where the action was brought. *Rhodes v. Southern Flour & Grain Co.*, 45 Ga. App. 13, 163 S.E. 237 (1932), later appeal, 49 Ga. App. 517, 176 S.E. 121 (1934).

**Affidavit does not go behind judgment** if the affidavit merely alleges that the property advertised was not property that the marshal was authorized to sell. *Riviera Equip., Inc. v. Omega Equip. Corp.*, 147 Ga. App. 412, 249 S.E.2d 133 (1978).

**Garnishment judgment by default.** — When a summons of garnishment is issued and served upon the garnishee, who fails to appear in obedience to the summons and to answer either at the first term of the court at which the garnishee is required to appear, or at the next term thereafter, and judgment is rendered against the garnishee for the amount of the judgment previously obtained by the plaintiff against the defendant in the suit, the garnishee cannot attack the judgment by affidavit of illegality for causes anterior to it. *Henderson v. Mutual Fertilizer Co.*, 150 Ga. 465, 104 S.E. 229 (1920).

**Judgment by fraud, accident, or mistake.** — If a judgment was rendered



against a defendant by fraud, accident, or mistake, or the acts of the adverse party, unmixed with negligence on that party's part, an affidavit of illegality is not the proper remedy. *Markham v. Angier*, 57 Ga. 43 (1876); *Tumlin v. O'Bryan & Bros.*, 68 Ga. 65 (1881); *Nix v. Baxter*, 46 Ga. App. 153, 167 S.E. 115 (1932).

**Suits prematurely brought.** — If a suit is prematurely brought, objection should be made by demurrer (now motion to dismiss) if the defect appears in the petition. A judgment in favor of the plaintiff in such cases cannot be attacked by an affidavit of illegality. *Cooper v. Ricketson*, 14 Ga. App. 63, 80 S.E. 217 (1913); *Nix v. Baxter*, 46 Ga. App. 153, 167 S.E. 115 (1932).

**Client cannot by affidavit of illegality go behind consent judgment** entered by an attorney at law who has no authority to bind the attorney's client by a compromise agreement. *Patterson v. Georgia Gravel Co.*, 151 Ga. 813, 108 S.E. 237 (1921); *Childs v. State Bank*, 31 Ga. App. 533, 121 S.E. 254 (1924).

**Judgment, which shows on the judgment's face that it is a consent judgment**, cannot be attacked collaterally for want of assent. *Evans v. Evans*, 62 Ga. App. 618, 9 S.E.2d 99 (1940).

Court erred in allowing amendment to affidavit of illegality seeking to attack consent judgment. *Evans v. Evans*, 62 Ga. App. 618, 9 S.E.2d 99 (1940).

**Cause that could have initially been set up as defense.** — Defendant cannot attack judgment for any cause that the defendant could have set up as a defense in the original suit. *Mayor of Macon v. Trustees of Bibb County Academy*, 7 Ga. 204 (1849); *Harbig v. Freund & Co.*, 69 Ga. 180 (1882); *Butler, Stevens & Co. v. Hall*, 7 Ga. App. 777, 68 S.E. 331 (1910); *Murphey v. Smith*, 16 Ga. App. 472, 85 S.E. 791 (1915).

Affidavit of illegality interposed thereto is properly dismissed if all the grounds therein alleged might have been interposed in action on the note. *Stewart v. Youmans*, 61 Ga. App. 773, 7 S.E.2d 582 (1940).

**Setting up defense which had been settled by verdict.** — Defendant cannot by affidavit of illegality go behind judg-

ment by setting up defense of tender of debt, which issue was settled by verdict. The defendant's remedy would be a review of the case by a motion for a new trial. *Drake v. Ludden & Bates S. Music House*, 46 Ga. App. 745, 169 S.E. 213 (1933).

Defendant in execution may not by affidavit of illegality make the defense of payment of the debt, but only the payment of the execution itself. *Felker v. Johnson*, 189 Ga. 797, 7 S.E.2d 668 (1940).

**Alleging verdict not authorized by pleadings or judgment not following verdict.** — Defendant cannot go behind judgment for purpose of alleging that verdict was not authorized by the pleadings or that the judgment did not follow the verdict. *Bird v. Burgsteiner*, 108 Ga. 654, 34 S.E. 183 (1899); *Elliott v. Wilks*, 16 Ga. App. 466, 85 S.E. 679 (1915).

**Raising questions overruled in trial court and not appealed.** — Affidavit of illegality based on the ground that the garnishment was proceeding illegally because it was based on a void judgment was properly dismissed by a municipal court since it appeared that the affidavit sought to raise substantially the same questions raised by the defendant in a motion to set aside the judgment, which motion had been overruled, and the judgment overruling the motion was not appealed. *Clary v. Citizens Loan & Inv. Co.*, 65 Ga. App. 859, 16 S.E.2d 782 (1941).

**Alleging that trial court sat in improper place.** — Defendant, having had the defendant's day in court, could not go back on the judgment and attack by affidavit of illegality the prior justice court proceedings merely upon the ground that such court during the pendency of the case was not sitting at a place required by law. *Bryant v. Connell*, 50 Ga. App. 320, 178 S.E. 157 (1935).

**To deny that judgment ought to have been rendered on account of preexisting facts** is to go behind the judgment. *Tuff v. Loh*, 38 Ga. App. 526, 144 S.E. 670 (1928).

**If defects in judgment amount only to irregularities**, the judgment cannot be attacked by illegality by virtue of this section. *Brantley v. Greer*, 71 Ga. 11 (1883).

**When defendant attempts to go behind judgment as means of delay**



**only**, the court may award damages for the delay. *Drake v. Ludden & Bates S. Music House*, 46 Ga. App. 745, 169 S.E. 213 (1933).

**Cited** in *Kite v. Lumpkin*, 40 Ga. 506 (1869); *Bland v. Strange*, 52 Ga. 93 (1874); *Southern Ry. v. Daniels*, 103 Ga. 541, 29 S.E. 761 (1897); *Fitzgerald Granitoid Co. v. Alpha Portland Cement Co.*, 15 Ga. App. 174, 82 S.E. 774 (1914); *Orr v. Chattooga County Bank*, 145 Ga. 248, 88 S.E. 978 (1916); *Hancock v. Tifton Guano Co.*, 19 Ga. App. 185, 91 S.E. 246 (1917); *Ragan-Malone Co. v. Padgett*, 33 Ga. App. 111, 125 S.E. 605 (1924); *Barnes v. West Publishing Co.*, 33 Ga. App. 626, 127 S.E. 668 (1925); *Owen v. Federal Land Bank*, 37 Ga. App. 394, 140 S.E. 425 (1927); *Flanigan v. Hutchins*, 39 Ga. App. 220,

146 S.E. 500 (1929); *Leath v. Hardman*, 43 Ga. App. 270, 158 S.E. 453 (1931); *Payne v. Brown Constr. Co.*, 44 Ga. App. 592, 162 S.E. 410 (1932); *Swords v. Roach*, 175 Ga. 774, 166 S.E. 185 (1932); *Rhodes v. Southern Flour & Grain Co.*, 45 Ga. App. 13, 163 S.E. 237 (1932); *Oliver v. Rutland*, 48 Ga. App. 326, 172 S.E. 660 (1934); *Felker v. Johnson*, 189 Ga. 797, 7 S.E.2d 668 (1940); *Strickland v. Arnall*, 76 Ga. App. 439, 46 S.E.2d 195 (1948); *Hamilton v. Hamilton*, 80 Ga. App. 750, 57 S.E.2d 301 (1950); *Grading, Inc. v. Cook*, 211 Ga. 749, 88 S.E.2d 364 (1955); *Aetna Cas. & Sur. Co. v. Williams*, 131 Ga. App. 376, 206 S.E.2d 91 (1974); *West Point Pepperell, Inc. v. Springfield*, 238 Ga. 655, 235 S.E.2d 24 (1977); *Rawlins v. Busbee*, 169 Ga. App. 658, 315 S.E.2d 1 (1984).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 269 et seq.

**C.J.S.** — 33 C.J.S., Executions, § 288 et seq.

**ALR.** — Estoppel of or waiver by parties or participants regarding irregularities or defects in execution or judicial sale, 2 ALR2d 6.

### 9-13-122. Affidavit of illegality — Not available for excessive levy generally.

An affidavit of illegality shall not be a remedy for an excessive levy except where authorized by statute. (Code 1933, § 39-1004.)

**History of Code section.** — The language of this Code section is derived in

part from the decision in *Pinkston v. Harrell*, 106 Ga. 102, 31 S.E. 808 (1898).

### JUDICIAL DECISIONS

**Cited** in *Investors Fin. Co. v. Hill*, 194 Ga. 236, 21 S.E.2d 220 (1942); *Henry v.*

*Slack*, 86 Ga. App. 198, 71 S.E.2d 96 (1952).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, §§ 127, 128, 269.

**C.J.S.** — 33 C.J.S., Executions, § 288 et seq.

### 9-13-123. Affidavit of illegality — By whom filed.

An affidavit of illegality may be filed by an attorney in fact or by an executor, administrator, or other trustee. (Orig. Code 1863, § 3596;



Code 1868, § 3620; Code 1873, § 3670; Code 1882, § 3670; Civil Code 1895, § 4741; Civil Code 1910, § 5310; Code 1933, § 39-1002.)

### JUDICIAL DECISIONS

**Agent may make affidavit of illegality.** Van Dyke v. Besser, 34 Ga. 268 (1866).

**Attaching to affidavit writing showing agent's authority to file.** — It is not necessary that any writing showing agent's authority to file be attached to affidavit of illegality. Cook v. Buchanan, 86 Ga. 760, 13 S.E. 83 (1891); Lewis v. Beck & Gregg Hdwe. Co., 137 Ga. 515, 73 S.E. 739 (1912).

**Attorney in fact under this section**

is not necessarily an attorney at law. Misenheimer v. Gainey, 11 Ga. App. 509, 75 S.E. 844 (1912).

**Temporary administrator may file affidavit of illegality** to an execution proceeding to sell the intestate's lands, and the permanent administrator will, on motion, be allowed to become a party to the proceeding. Reese v. Burts, 39 Ga. 565 (1869).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 269 et seq.

**C.J.S.** — 33 C.J.S., Executions, § 288 et seq.

## 9-13-124. Affidavit of illegality — When received.

No affidavit of illegality shall be received by any sheriff or other executing officer until a levy has been made. (Laws 1838, Cobb's 1851 Digest, p. 514; Code 1863, § 3592; Code 1868, § 3615; Code 1873, § 3665; Code 1882, § 3665; Civil Code 1895, § 4737; Civil Code 1910, § 5306; Code 1933, § 39-1003.)

### JUDICIAL DECISIONS

**Until there is levy, affidavit of illegality cannot legally be filed** and is subject to dismissal. Associates Disct. Corp. v. Gentry, 96 Ga. App. 856, 101 S.E.2d 891 (1958).

**Affidavit properly dismissed when no showing that execution issued or levy made.** — When there is nothing in the record to show that an execution had been issued, the trial court did not err in dismissing the affidavit of illegality. Robbins v. Kinman, 177 Ga. 46, 169 S.E. 304 (1933).

Affidavit of illegality interposed by the defendant in the main case to a garnishment proceeding should be dismissed if the affidavit does not appear that there was any levy upon the property of the defendant. Powell v. Powell, 95 Ga. App. 122, 97 S.E.2d 193 (1957).

**Party estopped to deny levy once admitted in affidavit of illegality.** — Defendant in fieri facias who has recited a levy in the defendant's affidavit of illegality will not be heard to controvert the fact of such levy at the trial of the affidavit. Smith v. Camp, 84 Ga. 117, 10 S.E. 539 (1889).

**Affidavit improper when levy on property of another.** — When an execution against an individual has been levied upon property of a corporation, the former cannot interpose an affidavit of illegality thereto. State v. Sallade, 111 Ga. 700, 36 S.E. 922 (1900).

**Cited in** Georgia Ry. & Power Co. v. Head, 150 Ga. 177, 103 S.E. 158 (1920); Carter v. Alma State Bank, 34 Ga. App. 766, 131 S.E. 184 (1926); McClenton v. Wetherington, 89 Ga. App. 61, 78 S.E.2d



550 (1953); *Lenett v. Lutz*, 215 Ga. 369, 110 S.E.2d 628 (1959); *Marietta Broad-*

*casting Co. v. Advance Mktg. Research, Inc.*, 231 Ga. 13, 200 S.E.2d 134 (1973).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 269 et seq.

**C.J.S.** — 33 C.J.S., Executions, § 291 et seq.

### 9-13-125. Affidavit of illegality — When and how amendable.

Affidavits of illegality are, upon motion and leave of court, amendable instantly by the insertion of new and independent grounds, provided that the defendant shall swear that he did not know of such grounds when the original affidavit was filed. (Laws 1850, Cobb's 1851 Digest, p. 518; Code 1863, § 3430; Code 1868, § 3450; Code 1873, § 3501; Code 1882, § 3501; Civil Code 1895, § 5120; Civil Code 1910, § 5704; Code 1933, § 39-1005.)

### JUDICIAL DECISIONS

**This section permits affidavit of illegality to be amended** by setting up new grounds of fact, provided that the affiant swears that the affiant had no knowledge of those facts when the affidavit was filed. The absence of the oath is ground for demurrer (now motion to dismiss). *Mosley v. Fryer & Son*, 102 Ga. 564, 27 S.E. 667 (1897); *Ray v. Hixon*, 107 Ga. 768, 33 S.E. 692 (1899); *Georgia N. Ry. v. Cone*, 17 Ga. App. 786, 88 S.E. 701 (1916).

**This section has no particular reference to amendments setting up purely equitable defenses**, or defenses praying for ordinary or extraordinary relief, and the right to such amendments must be determined by the law in reference thereto. *Tanner v. Wilson*, 183 Ga. App. 53, 187 S.E. 625 (1936).

**Affidavit of illegality is amendable by adding new and distinct grounds.** *Head v. Edgar Bros. Co.*, 60 Ga. App. 482, 4 S.E.2d 71 (1939), appeal dismissed, 309 U.S. 630, 60 S. Ct. 617, 84 L. Ed. 989 (1940).

**Amendment of affidavit cannot raise pure questions of law.** *Savannah v. Wade*, 148 Ga. 766, 98 S.E. 464 (1919).

**Amendments may alter grounds of illegality already filed.** *Inman v. Miller*, 71 Ga. 293 (1883).

**New affidavit cannot be substituted**

**for void one.** *Van Dyke v. Besser*, 34 Ga. 268 (1866).

**Jurat to affidavit of illegality is amendable** by adding the official designation of the person who administered the oath. *Smith v. Walker*, 93 Ga. 252, 18 S.E. 830 (1894).

**Demurrer (now motion to dismiss) by defendant in execution** cannot raise defenses which are subject matter of affidavit of illegality. *Glynn County v. Dubberly*, 148 Ga. 290, 96 S.E. 566 (1918).

**Amendment not legal when not filed within time allowed by court.** — When a demurrer (now motion to dismiss) to an affidavit of illegality is sustained with leave to the affiant to amend within 30 days by setting out the manner and method of an alleged payment, an amendment meeting the conditions contained in the court's order, which is filed in the office of the clerk of the court within the specified period, but which was not, within that period, allowed by an order of the court, does not constitute a legal amendment to the affidavit of the illegality. *Clark v. J.R. Watkins Co.*, 43 Ga. App. 697, 159 S.E. 911 (1931).

**Amendment properly disallowed when no oath filed.** — When an amendment to an affidavit of illegality was offered and the amendment contained no



averment under oath that the additional grounds set out therein were unknown to the affiant at the time of the filing of the original affidavit, the amendment was properly disallowed. *Kile v. City of Marietta*, 42 Ga. App. 169, 155 S.E. 498 (1930).

It is not error for the court to disallow the amendments offered by the deponent in absence of the oath of the deponent that the deponent did not know of the grounds set out in the amendments when the original affidavit was filed. *Aycock v. Universal C.I.T. Credit Corp.*, 80 Ga. App. 797, 57 S.E.2d 510 (1950).

When upon demurrer (now motion to dismiss) hearing, the affiant tendered an amendment to the affiant's original affidavit of illegality, which did not contain any averment that the affiant did not know of such grounds when the original affidavit was filed, under the provisions of this section the court properly disallowed the amendment upon objection thereto on this ground. *Deese v. City of Dublin*, 88 Ga. App. 341, 76 S.E.2d 629 (1953).

**Amendment which merely amplifies or amends ground in original affidavit** need not be sworn to. *McCook v. Laughlin*, 9 Ga. App. 550, 71 S.E. 917 (1911); *Cooper Co. v. Lanier*, 17 Ga. App. 688, 87 S.E. 1092 (1916); *Savannah v.*

*Wade*, 148 Ga. 766, 98 S.E. 464 (1919); *Head v. Wilkinson*, 186 Ga. 739, 198 S.E. 782 (1938); *Williamson v. Tracy Bldrs., Inc.*, 94 Ga. App. 203, 94 S.E.2d 139 (1956).

**Effect of failure to amend.** — Failure to amend an affidavit which was subsequently dismissed permits the plaintiff to assert all the plaintiff's rights. *Ansley v. Wilson*, 47 Ga. 280 (1872).

**Failure to object will be held to be waiver of requirement for verification.** *Evans v. Evans*, 62 Ga. App. 618, 9 S.E.2d 99 (1940).

**Amendment attacking judgment which was facially consent judgment.** — Court erred in allowing amendment seeking to attack judgment which showed on the judgment's face that it was a consent judgment. *Evans v. Evans*, 62 Ga. App. 618, 9 S.E.2d 99 (1940).

**Cited in** *Heard v. Sibley*, 52 Ga. 310 (1874); *Rawlings v. Brown*, 15 Ga. App. 162, 82 S.E. 803 (1914); *Carmichael v. Mobley*, 50 Ga. App. 574, 178 S.E. 418 (1934); *Thompson v. Georgia Power Co.*, 73 Ga. App. 587, 37 S.E.2d 622 (1946); *McLendon v. Lemon*, 79 Ga. App. 751, 54 S.E.2d 437 (1949); *Sirmans v. Citizens & S. Nat'l Bank*, 132 Ga. App. 894, 209 S.E.2d 697 (1974).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 269 et seq.

**C.J.S.** — 33 C.J.S., Executions, § 291 et seq.

### 9-13-126. Amount and condition of forthcoming bond.

When an execution is levied on personal property and an affidavit of illegality is filed thereto and the party filing the illegality desires to take or keep possession of the property, he shall deliver to the sheriff or other levying officer a bond payable to the levying officer, with good security in a sum equal to double the value of the property so levied upon, to be judged of by the levying officer, conditioned for the delivery of the property levied upon at the time and place of sale in the event that the illegality is dismissed by the court or withdrawn, which bond shall be recoverable in any court having cognizance thereof. (Orig. Code 1863, § 3598; Code 1868, § 3622; Code 1873, § 3672; Code 1882, § 3672; Civil Code 1895, § 5435; Civil Code 1910, § 6040; Code 1933, § 39-301.)



**Law reviews.** — For note discussing legal and equitable relief from execution

available to debtors, see 12 Ga. L. Rev. 814 (1978).

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**Former Civil Code 1910, § 6040** (see now O.C.G.A. § 9-13-126) prescribed requirements of forthcoming bond which may be filed to affidavit of illegality interposed, under former Civil Code 1910, § 5305 (see now O.C.G.A. § 9-13-120), to an execution against personalty. *Dawson v. Planters' Bank*, 31 Ga. App. 530, 121 S.E. 242 (1924).

**Bond should be payable to levying officer.** *Dawson v. Planters' Bank*, 31 Ga. App. 530, 121 S.E. 242 (1924).

**No bond is required when execution is against realty.** *Murphey v. Smith*, 16 Ga. App. 472, 85 S.E. 791 (1915).

**It is optional with defendant to file bond**, and a failure to do so will not affect the defendant's rights concerning the questions raised by the affidavit. *Herring v. Saulsbury, Respass & Co.*, 52 Ga. 396 (1874); *Wynn v. Knight*, 53 Ga. 568 (1874); *Crayton v. Fox*, 100 Ga. 781, 28 S.E. 510 (1897); *Humphreys v. Avery & Co.*, 28 Ga. App. 787, 113 S.E. 49 (1922).

When personal property is levied upon under a process of the court, it is optional with the defendant to exercise the right given the defendant by law to take possession of the property by giving the required bond. *Rogers v. Echols*, 50 Ga. App. 711, 179 S.E. 131 (1935).

**Owner of personal property levied on who has given bond to replevy is not required to pay costs**, including the expense of keeping the property while the property is under levy and in the possession of the levying officer as a condition precedent to obtaining possession of the property from the levying officer. *Rogers v. Echols*, 50 Ga. App. 711, 179 S.E. 131 (1935).

**Levying officer not bailee when defendant refuses to accept property after bond posted.** — When the defendant has given the required bond which entitles the defendant to possession of the property and the bond has been approved and accepted by the levying officer, and the property is tendered to the defendant, the defendant may, notwithstanding, refuse to accept and take possession of the property, and the property while continuing in the possession of the levying officer is in the officer's possession by virtue of the levy and in the officer's capacity as levying officer; the officer does not, by the defendant's refusal to accept the property, hold the property as bailee or agent for the defendant. *Rogers v. Echols*, 50 Ga. App. 711, 179 S.E. 131 (1935).

**Cited in** *Wade v. Wortsman*, 29 F. 754 (S.D. Ga. 1887); *Small Equip. Co. v. Walker*, 126 Ga. App. 827, 192 S.E.2d 167 (1972).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, § 209 et seq.

**C.J.S.** — 33 C.J.S., Executions, § 288 et seq.

**ALR.** — Right of obligor in action on forthcoming bond or receipt for return of property seized under process to set up title in himself, 37 ALR 1402.

### 9-13-127. Suspension of execution; return of execution, affidavit, and bond; determination by court; issue tried by jury.

When levy has been made and affidavit and bond delivered to the levying officer, it shall be the duty of the officer to suspend further proceedings on the execution and to return the execution, affidavit, and



bond to the next term of the court from which the execution issued. It shall be the duty of the court to make a determination thereon at the first term thereof unless the plaintiff or his attorney desires to controvert the facts contained in the affidavit, in which case an issue shall be joined and tried by a jury at the same term unless good cause is shown for a continuance. (Orig. Code 1863, § 3593; Code 1868, § 3616; Code 1873, § 3666; Code 1882, § 3666; Civil Code 1895, § 4738; Civil Code 1910, § 5307; Code 1933, § 39-1006.)

### JUDICIAL DECISIONS

**This section is applicable to** executions issued upon common-law judgments. *Owen v. Cunningham*, 111 Ga. App. 399, 141 S.E.2d 912 (1965).

**This section does not mean that, if proceeding is not tried at first term, court loses jurisdiction** of the case and is without the right or authority to dispose of the case at a later term. *Kamp Kill Kare v. Liabastre*, 89 Ga. App. 119, 79 S.E.2d 13 (1953).

**Section applicable to levy on land.** — No exception to the rule laid down in this section arises by reason of the fact that the levy is upon land. *Padgett v. Waters*, 4 Ga. App. 306, 61 S.E. 293 (1908).

**When papers returnable to justice of peace court.** — When an execution issues from a justice of peace court and affidavit of illegality is filed, it is the duty of the levying officer to return the papers to the justice of peace court for trial. *Padgett v. Waters*, 4 Ga. App. 306, 61 S.E. 293 (1908).

**Return to adjourned session.** — If the sheriff makes the sheriff's return to an adjourned session, and the clerk enters the case on the docket, it is error in the court to call the case up, and dismiss the case at that term. *Beall v. Bailey*, 45 Ga. 300 (1872).

**No notice of hearing necessary to affiant when return made to county court.** — When an affidavit of illegality is returned to a county court for trial, no notice of the time and place of hearing need be given to the party filing the affidavit. *Berry v. Jordan*, 121 Ga. 537, 49 S.E. 607 (1904).

**Sheriff protected though property not sold.** — Sheriff, whose term of office

expires pending trial of an illegality, is not in default for not selling the property when a proper bond has been taken and returned. *Tucker v. Keen*, 60 Ga. 410 (1878).

**Recitals of fact in affidavit of illegality must be taken as true**, unless written traverse or joinder of issue is filed, and when the affidavit of illegality had not been traversed at the time of the hearing, and in view of the recitals therein as to the settlement of the indebtedness by accord and satisfaction, the judge was authorized to find in favor of the defendant in execution as a matter of law. *Beavers v. Cassells*, 56 Ga. App. 146, 192 S.E. 249 (1937), *aff'd*, 186 Ga. 98, 196 S.E. 716 (1938).

**Allegations of fact contained in affidavit of illegality are taken as true** upon mere motion to strike. *Georgia Creosoting Co. v. Moody*, 41 Ga. App. 701, 154 S.E. 294 (1930).

**Proper method of joining issue on facts in affidavit**, when execution is based on common law judgment, is by writing. It cannot be done orally. *Thompson v. Fain*, 139 Ga. 310, 77 S.E. 166 (1913).

**When written traverse not required.** — When an execution is based on a non-common law judgment, a written traverse is not necessary. *Owen v. Cunningham*, 111 Ga. App. 399, 141 S.E.2d 912 (1965).

**Jury trial proper when written traverse is filed.** — When written traverse to affidavit is filed, issue thus raised is properly tried by jury. *Rogers v. Petty*, 43 Ga. App. 771, 160 S.E. 128 (1931).

**Motion to dismiss affidavit was rightly denied** when at least one of the



grounds thereof presented a legal defense against the further progress of the execution. *American Mtg. Co. v. Tennille*, 87 Ga. 28, 13 S.E. 158 (1891).

**When parties are at issue on facts set forth in affidavit**, the defendant in fieri facias cannot set up new grounds of illegality not contained in the defendant's affidavit. *Dever v. Akin*, 40 Ga. 423 (1869); *Brown v. Gill*, 49 Ga. 549 (1873).

**On trial of affidavit, burden of proof is on plaintiff** in fieri facias to make out prima facie case by putting in evidence an execution fair on the execution's face and a legal levy entered thereon. *Hill v. City of Calhoun*, 47 Ga. App. 753, 171 S.E. 459 (1933).

**Burden of proof on affiant when affidavit raises affirmative defenses.** — When an affidavit of illegality contains allegations of fact in the nature of affirmative defenses, upon issue joined the burden of establishing those defenses rests on the affiant. *Thompson v. Fain*, 139 Ga. 310, 77 S.E. 166 (1913); *Hill v. City of Calhoun*, 47 Ga. App. 753, 171 S.E. 459 (1933).

**Effect of want of prosecution by affiant.** — Affidavit of illegality having been filed before the time for the preceding regular term and counsel for the affiant being present and declining to try the case when the case was called for trial at the special term, the court did not err in dismissing the case for want of prosecution. *Walker v. O'Connor*, 23 Ga. App. 22, 97 S.E. 276 (1918).

**Cited in** *Bowen v. Groover*, 76 Ga. 101 (1885); *Moore v. O'Barr*, 87 Ga. 205, 13 S.E. 464 (1891); *Jackson v. Maner*, 95 Ga. 702, 22 S.E. 705 (1895); *Mobley v. Goodwyn*, 39 Ga. App. 64, 146 S.E. 28 (1928); *Scott v. Mayor of Mount Airy*, 186 Ga. 652, 198 S.E. 693 (1938); *Cain v. Dixie Trading Co.*, 73 Ga. App. 458, 36 S.E.2d 876 (1946); *McLendon v. Lemon*, 79 Ga. App. 751, 54 S.E.2d 437 (1949); *Powell v. Powell*, 95 Ga. App. 122, 97 S.E.2d 193 (1957); *Bosson v. Bosson*, 117 Ga. App. 629, 161 S.E.2d 433 (1968); *Riviera Equip., Inc. v. Omega Equip. Corp.*, 147 Ga. App. 412, 249 S.E.2d 133 (1978).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 30 Am. Jur. 2d, Executions and Enforcement of Judgments, §§ 269 et seq., 301 et seq.

**C.J.S.** — 33 C.J.S., Executions, § 288 et seq.

### 9-13-128. Damages for delay; procedure following dismissal or withdrawal of illegality.

Upon the trial of an issue formed on an affidavit of illegality, the jury trying the case shall have power to assess such damages as may seem reasonable and just, not exceeding 25 percent of the principal debt, where it is made to appear that the illegality was interposed for delay only. Whenever an illegality is dismissed for insufficiency or informality or is withdrawn, plaintiff in execution may proceed as is provided in cases where claims are dismissed or withdrawn. (Ga. L. 1859, p. 49, § 1; Code 1863, § 3594; Code 1868, § 3617; Ga. L. 1871-72, p. 52, § 1; Code 1873, § 3667; Code 1882, § 3667; Civil Code 1895, § 4739; Civil Code 1910, § 5308; Code 1933, § 39-1007.)



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**First sentence of this section permits assessment of damages for delay**, even though the affidavit is filed under a legislative act later declared unconstitutional. *White v. Haslett*, 49 Ga. 280 (1873).

**Under second sentence, affidavit of illegality may be withdrawn** by the party interposing the affidavit, subject to the right of the plaintiff in fieri facias to proceed, as in claim cases when the claims are withdrawn. *Thomas & Co. v. Parker*, 69 Ga. 283 (1882). See also *Rawlings v. Brown*, 15 Ga. App. 162, 82 S.E. 803 (1914).

**Circumstances authorizing jury to infer purpose of delay.** — When a portion of an affidavit of illegality has been dismissed on demurrer (now motion to dismiss) for insufficiency, and the remainder is admitted to be incorrect, the jury

may be authorized to infer from this that it was filed for delay only, and a verdict assessing damages in favor of the plaintiff in execution, at less than 25 percent of the principal debt, will not be disturbed since there is any evidence to support it, unless for some material error of law. *Felker v. Still*, 35 Ga. App. 236, 133 S.E. 519 (1926).

**Lack of discretion of court.** — When the trial court ruled on matters of law as to the claims in an affidavit of illegality and as a matter of law found that the claims lacked merit, the court had no legal discretion to deny damages. *Glover v. Ware*, 236 Ga. App. 40, 510 S.E.2d 895 (1999).

**Cited in** *Baker v. Akerman*, 77 Ga. 89 (1886); *Franklin v. Mobley*, 202 Ga. 212, 42 S.E.2d 755 (1947); *Hunt v. Lee*, 199 Ga. App. 130, 404 S.E.2d 446 (1991).

## RESEARCH REFERENCES

**C.J.S.** — 33 C.J.S., Executions, § 288 et seq.

**9-13-129. Property subject to other executions; retention of sale proceeds to satisfy first execution; release of bond pro tanto.**

When an execution has been levied on property and an affidavit of illegality has been filed to stay proceedings thereon, the property so levied on shall be subject to levy and sale under other executions. The officer making the first levy shall claim, receive, hold, and retain the amount of the proceeds of the sale as the court deems sufficient to pay the execution first levied, including interest up to the time of the court at which the illegality shall be determined. Any bond given by the defendant on filing the affidavit shall be released and discharged so far as relates to the property sold. (Laws 1845, Cobb's 1851 Digest, p. 516; Code 1863, § 3595; Code 1868, § 3619; Code 1873, § 3669; Code 1882, § 3669; Civil Code 1895, § 4740; Civil Code 1910, § 5309; Code 1933, § 39-1008.)

## RESEARCH REFERENCES

**C.J.S.** — 33 C.J.S., Executions, § 10.



## ARTICLE 7

### JUDICIAL SALES

**Cross references.** — Procedure for tax sales, § 48-2-55. Distressed Commercial Real Estate: What are the Alternatives?,” see 16 (No. 4) Ga. St. B.J. 18 (2010).

**Law reviews.** — For article, “Buying Distressed Commercial Real Estate: What are the Alternatives?”, see 16 (No. 4) Ga. St. B.J. 18 (2010).

#### PART 1

#### ADVERTISEMENT

**Law reviews.** — For article, “Buying Distressed Commercial Real Estate: What are the Alternatives?”, see 16 (No. 4) Ga. St. B.J. 18 (2010).

### **9-13-140. How judicial sales advertised; description of property; advertisement and sale of livestock.**

(a) The sheriff, coroner, or other officer shall publish weekly for four weeks in the legal organ for the county, or if there is no newspaper designated as such, then in the nearest newspaper having the largest general circulation in such county, notice of all sales of land and other property executed by the officer. In the advertisement the officer shall give a full and complete description of the property to be sold, making known the names of the plaintiff, the defendant, and any person who may be in the possession of the property. In the case of real property, such advertisement shall include the legal description of such real property and may include the street address of such real property, if available, but provided that no foreclosure shall be invalidated by the failure to include a street address or by the insertion of an erroneous street address.

(b) However, horses, hogs, and cattle may be sold at any time by the consent of the defendant, in which case it shall be the duty of the officer to give the plaintiff ten days’ notice thereof and also to advertise the same at three or more public places in the county where the property may be at least ten days before the sale. (Laws 1799, Cobb’s 1851 Digest, p. 509; Laws 1850, Cobb’s 1851 Digest, p. 580; Ga. L. 1851-52, p. 78, § 1; Code 1863, § 3576; Ga. L. 1866, p. 163, § 1; Code 1868, § 3599; Code 1873, § 3647; Code 1882, § 3647; Civil Code 1895, § 5457; Civil Code 1910, § 6062; Code 1933, § 39-1101; Ga. L. 1995, p. 931, § 1; Ga. L. 1998, p. 213, § 1; Ga. L. 1999, p. 6, § 1.)

**Law reviews.** — For survey article on commercial law, see 44 Mercer L. Rev. 99 (1992). For review of 1998 legislation relating to judicial sales, see 15 Ga. St. U.L. Rev. 177 (1998). For article, “Buying Distressed Commercial Real Estate: What are the Alternatives?”, see 16 (No. 4) Ga. St. B.J. 18 (2010).

For note discussing procedures governing execution sales and the application of the proceeds of the sales, see 12 Ga. L. Rev. 814 (1978).



## JUDICIAL DECISIONS

**This section is constitutional**, and a foreclosure pursuant to this section does not violate procedural due process rights. *National Community Bldrs., Inc. v. Citizens & S. Nat'l Bank*, 232 Ga. 594, 207 S.E.2d 510 (1974).

**Purpose of section.** — This section was meant to bring about encouragement of newspapers to own their local plant, or the payment of rent to owners of local real estate, or to encourage the employment of citizens or residents of the locality which the newspapers serve, and in turn to bring about patronage of local merchants, schools, churches, and other establishments. *Carter v. Land*, 174 Ga. 811, 164 S.E. 205 (1932).

**Intention of General Assembly** was to aid in building up locality to be served by newspaper advertisements. *Carter v. Land*, 174 Ga. 811, 164 S.E. 205 (1932).

**Purpose of legal advertisement is to have adequate notice to parties involved and to public.** *Georgia Cracker v. Hesters*, 193 Ga. 706, 20 S.E.2d 7, answer conformed to, 67 Ga. App. 327, 20 S.E.2d 197 (1942).

**It is duty of officers to publish legal advertisements** in newspaper published in county. *McGinty v. Chambers*, 182 Ga. 341, 185 S.E. 513 (1936).

**Duty when no newspaper published in county.** — This section requires that if there be no newspaper published in the county, it becomes the sheriff's duty to publish notice in nearest newspaper having the largest or a general circulation in such county. *Lamb v. Allen*, 50 Ga. 207 (1873).

**Liberal construction.** — General Assembly intended that county officers should be held only to substantial compliance with this section which was to be liberally construed. *Carter v. Land*, 174 Ga. 811, 164 S.E. 205 (1932).

**Publishing newspaper, as contemplated by General Assembly** with reference to this section, means something more than mere distribution of a newspaper and something more than having it entered at the post office for distribution in the mails. *Carter v. Land*, 174 Ga. 811, 164 S.E. 205 (1932).

Under O.C.G.A. §§ 9-13-140 and 9-13-142, there exists no requirement that a journal or newspaper must in fact be distributed to the public "as a whole" in order for the advertisement to be deemed legally and sufficiently published. *Sparti v. Joslin*, 230 Ga. App. 346, 496 S.E.2d 490 (1998).

**Words "nearest to the county"** do not necessarily mean nearest to the county line. *Carter v. Land*, 174 Ga. 811, 164 S.E. 205 (1932).

Mere nearness to the county line does not necessarily determine that such newspaper is the nearest within the meaning of this section. *McGinty v. Chambers*, 182 Ga. 341, 185 S.E. 513 (1936).

**Newspaper need not be mechanically printed in county** the newspaper serves as official organ. *Southeastern Newspapers Corp. v. Griffin*, 245 Ga. 748, 267 S.E.2d 21 (1980).

**As between two or more papers published at county site**, the sheriff has discretion of making a selection. *Braddy v. Whiteley*, 113 Ga. 746, 39 S.E. 317 (1901).

Officers have discretion as to whether the award shall be made to the one having the largest circulation or to the one merely having general circulation. *Carter v. Land*, 174 Ga. 811, 164 S.E. 205 (1932).

**Advertisement was sufficient when published four times at weekly intervals** though less than four full weeks intervened between the first publication and the day of sale. *Champion Box Co. v. Manatee Crate Co.*, 75 F.2d 340 (5th Cir. 1935).

While former Code 1933, § 39-1101 (see now O.C.G.A. § 9-13-140) required publications weekly, for four weeks, former Code 1933, § 39-1102 (see now O.C.G.A. § 9-13-140) made it clear that a publication on any day of each of the four weeks preceding the sale is sufficient, regardless of the number of days between the date of the first publication and the sale. *Champion Box Co. v. Manatee Crate Co.*, 75 F.2d 340 (5th Cir. 1935).

Required weekly publication for four weeks is complied with by the insertion of the advertisement in each of the four



calendar weeks preceding that in which the sale was had, although 28 days did not elapse between the date of the first insertion and the date of the sale. *Heist v. Dunlap & Co.*, 193 Ga. 462, 18 S.E.2d 837 (1942).

**Sunday advertisement is void.** *Sawyer v. Cargile*, 72 Ga. 290 (1884).

**Naming parties unnecessary in sale under power in security deed.** — As there is no plaintiff or defendant in sale under power contained in security deed, it is not necessary to name parties in the legal advertisement. Nor does the law require the advertisement to name the persons in possession. *Southern Mut. Inv. Corp. v. Thornton*, 131 Ga. App. 765, 206 S.E.2d 846 (1974).

**Sale is valid, notwithstanding omission to advertise sale** as required by this section, but the sheriff is liable to make good any loss happening to anyone interested, occasioned by the omission to advertise. *Brooks v. Rooney*, 11 Ga. 423 (1852); *Johnson v. Reese*, 28 Ga. 353 (1859).

Failure to advertise as required by this section is an irregularity which would not affect the purchaser not shown to have had knowledge of the defect. *Ryals v. Lindsay*, 176 Ga. 7, 167 S.E. 284 (1932).

**Sale not absolutely void because of failure to advertise four weeks.** — Alleged failure to advertise the four weeks immediately preceding the sale pursuant to O.C.G.A. § 9-13-141 would not render the sale absolutely void. *Stripling v. F & M Bank*, 175 Ga. App. 75, 332 S.E.2d 373 (1985).

**Property description was adequate.** — Foreclosure advertisement's description of the property contained a correct legal description of the property, although the advertisement did not match the incorrect legal description in the deed to secure debt; therefore, the advertisement met the minimum legal requirements prescribed by O.C.G.A. § 9-13-140(a). *Yellow Creek Invs., LLC v. Multibank 2009-1 CRE Venture, LLC*, 329 Ga. App. 577, 765 S.E.2d 728 (2014).

**Innocent purchaser was not chargeable with sheriff's neglect to advertise** as required by former Code 1933, § 39-1101 (see now O.C.G.A.

§ 9-13-140); the purchaser was only required to see, pursuant to former Code 1933, § 39-1311 (see now O.C.G.A. § 9-13-168), that the officer had authority to sell, and that the officer was apparently proceeding under the prescribed forms, and the title of such an innocent purchaser was not affected by the sheriff's failure to advertise the sale. *Dooley v. Bohannon*, 191 Ga. 7, 11 S.E.2d 188 (1940).

**Sale by consent of creditors, not advertised,** though at public outcry, is not sheriff's sale. *Davis v. Collier & Beers*, 13 Ga. 485 (1853).

**Advertisement published in newspaper is best original evidence** of existence of legal advertisement under the levy, and unless accounted for, a copy is not admissible. *Southwestern R.R. v. Papot*, 67 Ga. 675 (1881). See also *Schley v. Lyon*, 6 Ga. 530 (1849).

**Amount of debt is not required in the advertisement** and so a misstatement or overstatement of the debt does not render the advertisement legally defective. *Southeast Timberlands, Inc. v. Security Nat'l Bank*, 220 Ga. App. 359, 469 S.E.2d 454 (1996).

**Defects in an advertisement** will prevent confirmation only if the factfinder determines those defects "chilled" bidding and caused an inadequate selling price. *Southeast Timberlands, Inc. v. Security Nat'l Bank*, 220 Ga. App. 359, 469 S.E.2d 454 (1996).

**Contention that contents of advertisement interfered with sale.** — There was sufficient evidence to support the trial court's finding that the advertisement of foreclosure did not have a chilling effect on the sale of the property when, even though the advertisement contained an error, there was evidence that there were parties in addition to the purchasing bank present at the foreclosure sale and the appellant's appraisal witness testified that the witness encountered no difficulty in locating the property using the description in the legal advertisement. *Oates v. Sea Island Bank*, 172 Ga. App. 178, 322 S.E.2d 291 (1984).

Borrower's admission that the foreclosure notice complied with the minimum statutory requirements did not preclude



the borrower's bid-chilling claim. *LSREF2 Baron, LLC v. Alexander SRP Apts., LLC*, No. 1:12-CV-2545-AT, 2013 U.S. Dist. LEXIS 187236 (N.D. Ga. Feb. 13, 2013).

**Lifting of automatic stay provisions of Bankruptcy Code not stated.** — Fact that the advertisement did not state that the automatic stay provisions of the Bankruptcy Code had been lifted with respect to the debtor's property did not tend to "chill" the sale of the property. *Shingler v. Coastal Plain Prod. Credit Ass'n*, 180 Ga. App. 539, 349 S.E.2d 785 (1986).

**Tax sale of property proper.** — Trial court properly granted summary judgment to the purchaser of real estate in a quiet title action that involved the taxpayer's home and the taxpayer's failure to pay the property taxes on the property as the property was properly levied upon and no question of fact remained that the sheriff officially seized the property. Further, the affidavits of the civil process coordinator at the time of the tax sale, and the coordinator's successor, were properly admitted into evidence as such affidavits fell within the business records exception to the rule against hearsay. *Davis v. Harpagon Co., LLC*, 283 Ga. 539, 661 S.E.2d 545 (2008).

**Damages for wrongful foreclosure.** — In a suit brought by a purchaser seeking damages for wrongful foreclosure of certain real property after two foreclosure sales, the trial court erred in granting the second foreclosing bank attorney fees under O.C.G.A. § 9-15-14, based on frivolous litigation since the second bank had knowledge of the purchaser's acquisition of the property via the first foreclosure, therefore, the purchaser's suit did not lack substantial justification as to the second bank and the second's bank failure to provide proper notice of the sale to the purchaser. *Royston v. Bank of Am., N.A.*, 290 Ga. App. 556, 660 S.E.2d 412 (2008).

**Wrongful foreclosure claim sufficiently pled.** — Trial court erred by dismissing the mortgagors' complaint for wrongful foreclosure because, construed in the light most favorable to the mortgagors, the complaint sufficiently alleged that the bank owed obligations to the mortgagors under the security deed and that the

bank breached those contractual obligations by going forward with the foreclosure sale despite the error in the published foreclosure advertisements. *Racette v. Bank of Am., N.A.*, 318 Ga. App. 171, 733 S.E.2d 457 (2012).

**Foreclosure advertisement sufficient as to real property only.** — Advertisement which a bank published when the bank sold a bowling alley at a foreclosure sale, which provided a metes and bounds description of the property, was sufficient under O.C.G.A. §§ 9-13-40 and 44-14-162 to foreclose on and convey title only to the real property, and a trial was required to determine the amount of money the bank had to turn over to a Chapter 7 debtor's bankruptcy estate under 11 U.S.C. § 542 because the bank improperly sold the debtor's personal property. The court found that the court could not determine on summary judgment whether bowling alley lanes and pin setters the bank sold were fixtures or personal property and the court ordered the parties to present evidence on that issue at trial. *Lubin v. Ga. Commerce Bank (In re Southern Bowling, Inc.)*, No. 09-06045, 2010 Bankr. LEXIS 4007 (Bankr. N.D. Ga. Oct. 8, 2010).

**Foreclosure advertisement sufficient.** — Foreclosure sale advertisement of a condominium development was sufficient although the advertisement did not note that several units in the development had been sold prior to the foreclosure. The description of the property was correct in itself and the excepted units were identified on the courthouse steps at the time of the sale. *Dan Woodley Cmtys., Inc. v. Suntrust Bank*, 310 Ga. App. 656, 714 S.E.2d 145 (2011).

Superior court did not err in finding that a lender's advertisement of a nonjudicial foreclosure sale properly included a description of the property in accordance with O.C.G.A. § 9-13-140(a) because the legal description in the advertisement was identical to the description in the security deed by which the lender took the lender's interest from a construction company and guarantors; thus, there was no discrepancy between the two, and the advertisement properly reflected the interest taken under the deed and avail-



able at the foreclosure sale. *Diplomat Constr., Inc. v. State Bank of Tex.*, 314 Ga. App. 889, 726 S.E.2d 140 (2012).

**Preservation for review.** — Property owner's claim that a foreclosure advertisement did not comply with O.C.G.A. §§ 9-13-140(a) and 44-14-162 was waived on appeal due to the owner's failure to comply with Ga. Ct. App. R. 25(a)(1); the owner did not show how the enumeration of error was preserved for review and the owner did not provide any relevant citation to the record to show that the claim of error was raised below. *White Oak Homes, Inc. v. Cmty. Bank & Trust*, 314 Ga. App. 502, 724 S.E.2d 810 (2012), cert. denied, No. S12C1120, 2012 Ga. LEXIS 671 (Ga. 2012).

**Trial court erred by failing to confirm sale.** — Trial court erred by denying a creditor's petition to confirm the foreclosure sale of six townhouses because the sale satisfied applicable notice and advertisement requirements and the uncontradicted evidence showed that the townhouses did sell for at least fair market value. *RBC Real Estate Fin., Inc. v. Winmark Homes, Inc.*, 318 Ga. App. 507, 736 S.E.2d 117 (2012).

**Cited in** *Patterson v. Lemon*, 50 Ga. 231 (1873); *Williams & Co. v. Hart*, 65 Ga. 201 (1880); *Dollar v. Wind*, 135 Ga. 760, 70

S.E. 335 (1911); *Hill v. Kitchens*, 39 Ga. App. 789, 148 S.E. 754 (1929); *Bush v. Growers' Fin. Corp.*, 176 Ga. 99, 167 S.E. 105 (1932); *Smith v. Associated Mtg. Cos.*, 186 Ga. 121, 197 S.E. 222 (1938); *Zugar v. Scarbrough*, 186 Ga. 310, 197 S.E. 854 (1938); *Georgia Cracker v. Hesters*, 193 Ga. 706, 20 S.E.2d 7 (1942); *Sellers v. Johnson*, 207 Ga. 644, 63 S.E.2d 904 (1951); *Moore v. Heard*, 213 Ga. 711, 101 S.E.2d 92 (1957); *Reed v. Southland Publishing Co.*, 222 Ga. 523, 150 S.E.2d 817 (1966); *Law v. USDA*, 366 F. Supp. 1233 (N.D. Ga. 1973); *Roberts v. Cameron-Brown Co.*, 410 F. Supp. 988 (S.D. Ga. 1975); *Oglethorpe Co. v. United States*, 558 F.2d 590 (Ct. Cl. 1977); *Shantha v. West Ga. Nat'l Bank*, 145 Ga. App. 712, 244 S.E.2d 643 (1978); *Williams v. Athens Newspapers, Inc.*, 241 Ga. 274, 244 S.E.2d 822 (1978); *Wachovia Mtg. Co. v. DeKalb County*, 241 Ga. 416, 246 S.E.2d 183 (1978); *Five Dee Ranch Corp. v. Federal Land Bank*, 148 Ga. App. 734, 252 S.E.2d 662 (1979); *Sanders v. State*, 151 Ga. App. 590, 260 S.E.2d 504 (1979); *Weems v. McCloud*, 619 F.2d 1081 (5th Cir. 1980); *Community Newspapers, Inc. v. Baker*, 198 Ga. App. 680, 402 S.E.2d 545 (1991); *Howser Mill Homes, LLC v. Branch Banking & Trust Co.*, 318 Ga. App. 148, 733 S.E.2d 441 (2012).

## OPINIONS OF THE ATTORNEY GENERAL

**County commissioner must publish official tax levy** in currently constituted county official organ. 1948-49 Op. Att'y Gen. p. 470.

**Newspaper may be mechanically printed outside county.** — Bona fide county newspaper which was otherwise

qualified under former Code 1933, §§ 39-1101 through 1103 and 1107 (see now O.C.G.A. §§ 9-13-140 and 9-13-142) may be chosen as the official organ of the county even if the newspaper was mechanically printed outside of the county. 1973 Op. Att'y Gen. No. U73-15.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 47 Am. Jur. 2d, Judicial Sales, § 59 et seq.

**Am. Jur. Pleading and Practice Forms.** — 15A Am. Jur. Pleading and Practice Forms, Judgments, § 521. 15A Am. Jur. Pleading and Practice Forms, Judicial Sales, § 12.

**C.J.S.** — 50A C.J.S., Judicial Sales, § 14 et seq.

**ALR.** — Necessity that newspaper be published in English language to satisfy requirements regarding publication of legal or official notice, 90 ALR 500.

What constitutes newspaper of "general circulation" within meaning of state statutes requiring publication of official notices and the like in such newspaper, 24 ALR4th 822.



**9-13-141. Timing of advertisements.**

In all cases where the law requires citations, notices, or advertisements by probate court judges, clerks, sheriffs, county bailiffs, administrators, executors, guardians, trustees, or others to be published in a newspaper for 30 days or for four weeks or once a week for four weeks, it shall be sufficient and legal to publish the same once a week for four weeks, that is, one insertion each week for each of the four weeks, immediately preceding the term or day when the order is to be granted or the sale is to take place. The number of days between the date of the first publication and the term or day when the order is to be granted or the sale is to take place, whether more or less than 30 days, shall not in any manner invalidate or render irregular the notice, citation, advertisement, order, or sale. (Ga. L. 1876, p. 99, § 1; Code 1882, § 2628a; Ga. L. 1890-91, p. 241, § 1; Civil Code 1895, § 5458; Civil Code 1910, § 6063; Code 1933, § 39-1102.)

**JUDICIAL DECISIONS**

**This section is constitutional**, and a foreclosure pursuant to it does not violate procedural due process rights. *National Community Bldrs., Inc. v. Citizens & S. Nat'l Bank*, 232 Ga. 594, 207 S.E.2d 510 (1974).

**Legislative intent.** — The week of seven days was not intended to be taken as the period in which one publication only of the notice must necessarily be made because such was the statute as interpreted by the court at the time of the passage of the Act codified in this section; hence this section, in referring to the publication to be made once a week for four weeks, means a calendar week, and if notice shall be made on any day of a calendar week, that shall be counted as a publication for that week. *Bush v. Growers' Fin. Corp.*, 176 Ga. 99, 167 S.E. 105 (1932).

**Modification of previous rule as to stated weeks.** — This section modifies the rule that advertisement for stated weeks means full weeks must elapse between the first appearance of the advertisement and the sale. *Arthur v. Terry*, 131 F.2d 73 (5th Cir. 1942).

**This section is without reference to number of days which may elapse** between the day of the first insertion and the day of sale. *Smith v. Associated Mtg. Cos.*, 186 Ga. 121, 197 S.E. 222 (1938).

**Day of sale not to be within same week as last publication.** — This section requires that day of sale shall not be within same week as last publication. *Conley v. Redwine*, 109 Ga. 640, 35 S.E. 92 (1900). But see *Bush v. Growers' Fin. Corp.*, 176 Ga. 99, 167 S.E. 105 (1932).

**Notice may be made within week when sale to occur.** — This section appears to allow notice to be made on day within week when sale is to take place because the act expressly excludes computation of days. *Bush v. Growers' Fin. Corp.*, 176 Ga. 99, 167 S.E. 105 (1932). But see *Conley v. Redwine*, 109 Ga. 640, 35 S.E. 92 (1900).

**This section does not apply to creditor holding deed as security** with power of sale. *Wright v. Harris*, 221 F. 736 (S.D. Ga.), aff'd, 228 F. 1021 (5th Cir. 1915), cert. denied, 241 U.S. 658, 36 S. Ct. 287, 60 L. Ed. 1225 (1916); *Proudfit v. Oliver*, 150 Ga. 707, 105 S.E. 241 (1920).

**Municipal charter provisions relating to advertisement of tax sales.** — This section does not affect provisions of municipal charter relating to advertisement of tax sales. *Montford v. Allen*, 111 Ga. 18, 36 S.E. 305 (1900).

**"Week" in required notices** is calendar week and not period of seven days. *DeKalb County v. Carriage Woods Civic Ass'n*, 228 Ga. 380, 185 S.E.2d 752 (1971).



**Powers of sale executed in individual transactions** may be construed in light of this section as to the length of time requisite for advertisement of such sales. *Plainville Brick Co. v. Williams*, 170 Ga. 75, 152 S.E. 85 (1930).

**Advertisement was sufficient when published four times at weekly intervals** though less than four full weeks intervened between the first publication and the day of sale. *Champion Box Co. v. Manatee Crate Co.*, 75 F.2d 340 (5th Cir. 1935).

While former Code 1933, § 39-1101 (see now O.C.G.A. § 9-13-140) required publications weekly, for four weeks, former Code 1933, § 39-1102 (see now O.C.G.A. § 9-13-141) made it clear that a publication on any day of each of the four weeks preceding the sale is sufficient, regardless of the number of days between the date of the first publication and the sale. *Champion Box Co. v. Manatee Crate Co.*, 75 F.2d 340 (5th Cir. 1935).

Required weekly publication for four weeks is complied with by the insertion of the advertisement in each of the four calendar weeks preceding that in which the sale was had, although 28 days did not elapse between the date of the first insertion and the date of the sale. *Heist v. Dunlap & Co.*, 193 Ga. 462, 18 S.E.2d 837 (1942).

When the return of the appraisers to record was entered within less than 28 days from the first publication of citation and it appears that the citation was published once a week for four calendar weeks next preceding the date of the order, this was a compliance with the law, even though the first publication may have been made less than 28 days before the order was passed. *Johnson v. City of*

*Blackshear*, 196 Ga. 652, 27 S.E.2d 316 (1943).

Foreclosure sale was void when the required legal advertisement was not published during the week immediately preceding the sale. *Foster v. F & M Bank*, 108 Bankr. 361 (Bankr. M.D. Ga. 1989).

**Not every irregularity furnishes a basis for voiding a foreclosure sale.** Crucial point of the inquiry on confirmation is to insure that the sale was not chilled and the price bid was in fact market value. *Stripling v. F & M Bank*, 175 Ga. App. 75, 332 S.E.2d 373 (1985).

**Sale not absolutely void because of failure to advertise four weeks.** — Alleged failure to advertise the four weeks immediately preceding the sale pursuant to O.C.G.A. § 9-13-141 would not render the sale absolutely void. *Stripling v. F & M Bank*, 175 Ga. App. 75, 332 S.E.2d 373 (1985).

**Cited in** *Hammond v. Clark*, 136 Ga. 313, 71 S.E. 479 (1911); *McDonald v. City of Baxley*, 40 Ga. App. 713, 151 S.E. 413 (1930); *Hardin v. Dodd*, 176 Ga. 119, 167 S.E. 277 (1932); *Heist v. Dunlap & Co.*, 193 Ga. 462, 18 S.E.2d 837 (1942); *Georgia Cracker v. Hesters*, 193 Ga. 706, 20 S.E.2d 7 (1942); *Sellers v. Johnson*, 207 Ga. 644, 63 S.E.2d 904 (1951); *Bracewell v. Warnock*, 208 Ga. 388, 67 S.E.2d 114 (1951); *Verner v. McLarty*, 213 Ga. 472, 99 S.E.2d 890 (1957); *DeKalb County v. Carriage Woods Civic Ass'n*, 228 Ga. 380, 185 S.E.2d 752 (1971); *Law v. USDA*, 366 F. Supp. 1233 (N.D. Ga. 1973); *Roberts v. Cameron-Brown Co.*, 410 F. Supp. 988 (S.D. Ga. 1975); *Foster v. F & M Bank*, 105 Bankr. 746 (Bankr. M.D. Ga. 1989); *Howser Mill Homes, LLC v. Branch Banking & Trust Co.*, 318 Ga. App. 148, 733 S.E.2d 441 (2012).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 47 Am. Jur. 2d, Judicial Sales, §§ 56, 57.

**C.J.S.** — 50A C.J.S., Judicial Sales, § 14 et seq.



**9-13-142. Requirements for official organ of publication; designation where no journal or newspaper qualifies; how official organ changed; notice to Secretary of State.**

(a) No journal or newspaper published in this state shall be declared, made, or maintained as the official organ of any county for the publication of sheriff's sales, citations of probate court judges, or any other advertising commonly known in terms of "official or legal advertising" and required by law to be published in such county official newspaper unless the newspaper shall meet and maintain the following qualifications:

(1) "Newspaper" as used in this Code section means a printed product of multiple pages containing not greater than 75 percent advertising content in no more than one-half of its issues during the previous 12 months, excluding separate advertising supplements inserted into but separately identifiable from any regular issue or issues of the newspaper;

(2) The newspaper shall be published within the county and continuously at least weekly for a period of two years or is the direct successor of such a newspaper. Failure to publish for not more than two weeks in any calendar year shall not disqualify a newspaper otherwise qualified;

(3) For a period of two years prior to designation and thereafter, the newspaper shall have and maintain at least 75 percent paid circulation as established by an independent audit. Paid circulation shall not include newspapers that are distributed free or in connection with a service or promotion at no additional charge to the ultimate recipient. For circulation to be considered paid, the recipient of the newspaper or such recipient's employer or household must pay reasonable and adequate consideration for the newspaper. No rules of circulation of audit companies, the United States Postal Service, or accounting principles may be considered in determining paid circulation if they are inconsistent with the provisions of this subsection;

(4) Based on the published results of the 1990 United States decennial census or any future such census, the newspaper shall have and maintain at least the following paid circulation within the county for which it is designated as the legal organ newspaper:

(A) Five hundred copies per issue in counties having a population of less than 20,000;

(B) Seven hundred fifty copies per issue in counties having a population of at least 20,000 but less than 100,000; or

(C) One thousand five hundred copies per issue in counties having a population of 100,000 or greater; and



(5) For purposes of this Code section, paid circulation shall include home or mail delivery subscription sales, counter, vendor and newsrack sales, and sales to independent newspaper contract carriers for resale. Paid circulation shall not include multiple copies purchased by one entity unless the multiple copies are purchased for and distributed to the purchaser's officers, employees, or agents, or within the purchaser's household.

(b) However, in counties where no journal or newspaper meets the qualifications set forth in subsection (a) of this Code section, the official organ may be designated by the judge of the probate court, the sheriff, and the clerk of the superior court, a majority of these officers governing from among newspapers otherwise qualified to be a legal organ that meet the minimum circulation in the preceding subsection for the county, or if there is no such newspaper, then the newspaper having the greatest general paid circulation in the county.

(c) Any selection or change in the official organ of any county shall be made upon the concurrent action of the judge of the probate court, the sheriff, and the clerk of the superior court of the county or a majority of the officers. No change in the official legal organ shall be effective without the publication for four weeks of notice of the decision to make a change in the newspaper in which legal advertisements have previously been published. All changes in the official legal organ shall be made effective on January 1 unless a change has to be made where there is no other qualified newspaper.

(d) Notwithstanding the other provisions of this Code section, an official organ of any county meeting the qualifications under the statute in force at the time of its appointment and which was appointed prior to July 1, 1999, may remain the official organ of that county until a majority of the judge of the probate court, the sheriff, and the clerk of the superior court determine to appoint a new official organ for the county.

(e) During the month of December in each year, the judge of the probate court of each county shall notify the Secretary of State, on a form supplied by the Secretary of State, of the name and mailing address of the journal or newspaper currently serving as the official organ of the county. The judge of the probate court shall also likewise notify the Secretary of State of any change in the official organ of the county at the time that such change is made. The Secretary of State shall maintain at all times a current listing of the names and addresses of all county organs and shall make such list available to any person upon request. (Laws 1850, Cobb's 1851 Digest, p. 580; Code 1863, § 3577; Code 1868, § 3600; Code 1873, § 3650; Code 1882, § 3650; Civil Code 1895, § 5460; Ga. L. 1910, p. 87, § 1; Code 1910, § 6065; Code 1933, §§ 39-1103, 39-1107; Ga. L. 1953, Nov.-Dec. Sess., p. 271,



§ 1; Ga. L. 1989, p. 1248, § 1; Ga. L. 1992, p. 1035, § 1; Ga. L. 1997, p. 528, § 1; Ga. L. 1999, p. 6, § 2.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1999, in subsection (a), punctuation was revised at the end of paragraphs (a)(1) through (a)(3), “United States” was substituted for “U.S.” in paragraph (a)(3), and “; and” was substituted for a period at the end of subparagraph (a)(4)(C); and a comma was inserted in subsections (d) and (e).

**Law reviews.** — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 13 (1997).

For note discussing procedures governing execution sales and the application of the proceeds of the sales, see 12 Ga. L. Rev. 814 (1978).

## JUDICIAL DECISIONS

**Continuous-publication requirement was intended as evidence of stability** that newspaper ought to have before it could enjoy the status of a legal gazette which must carry legal advertisements that affect the lives and property of citizens of this state. This statutory purpose is subserved if the newspaper does in fact have 85 percent paid circulation at the time of the newspaper’s designation as an official legal organ, and not necessarily by an 85 percent paid circulation of a two year duration. *Williams v. Athens Newspapers, Inc.*, 241 Ga. 274, 244 S.E.2d 822 (1978).

**Duties of designating officials.** — Officials charged with designating a newspaper as an official organ were not required to ensure that the newspaper met the statutory requirements at the time of the annual report to the Secretary of State. *Atlanta Journal v. Clarke*, 269 Ga. 33, 497 S.E.2d 358 (1998).

**Publication ordinance not a prior restraint.** — Requirement that applicants had to “advertise” in the legal gazette was not a prior restraint in violation of the First Amendment; thus, the city’s current zoning and adult entertainment ordinance was valid as the ordinance placed no time limits on when the paper had to run the advertisements and no repercussions if the paper failed to run the advertisement in a timely manner. Further, the legal organ of the county published public notices or advertisements as a matter of course and had certain restrictions placed on it pursuant to O.C.G.A. § 9-13-142. *Augusta Video, Inc. v.*

*Augusta-Richmond County*, No. 06-16053, 2007 U.S. App. LEXIS 21638 (11th Cir. Sept. 6, 2007) (Unpublished).

**Newspapers to which section applicable.** — This section applies alike to newspapers published in county and those nearest county having largest or general circulation therein. *McGinty v. Chambers*, 182 Ga. 341, 185 S.E. 513 (1936).

**Publication in county newspaper where county has newspaper.** — Newspaper selected as official organ must be published in county, if at time of selection a newspaper is published in the county. *Dooly v. Gates*, 194 Ga. 787, 22 S.E.2d 730 (1942).

**Subscriber list requirements.** — O.C.G.A. § 9-13-142 requires that the subscribers be legitimate subscribers who have paid adequate consideration for their subscriptions and who regularly receive the publication, not persons fraudulently listed by the newspaper who have not actually purchased subscriptions or whose subscriptions were paid for by the newspaper to inflate the newspaper’s subscriber list. *Community Newspapers, Inc. v. Baker*, 198 Ga. App. 680, 402 S.E.2d 545 (1991).

**Distribution.** — Under O.C.G.A. §§ 9-13-140 and 9-13-142, there exists no requirement that a journal or newspaper must in fact be distributed to the public “as a whole” in order for the advertisement to be deemed legally and sufficiently published. *Sparti v. Joslin*, 230 Ga. App. 346, 496 S.E.2d 490 (1998).

**“Change” construed.** — Mere private declaration of an intention to make a



change in the future, or an agreement with a publisher that at some future time a change should be made, was not a completed change within the provisions of this section. *Dollar v. Wind*, 135 Ga. 760, 70 S.E. 335 (1911) (but see *Southern Crescent Newspapers L.P. v. Dorsey*, 269 Ga. 41, 497 S.E.2d 360 (1998)).

**Interpretation of word "successor"** as used in this section is question of law. *New Era Publishing Co. v. Guess*, 231 Ga. 250, 201 S.E.2d 142 (1973).

**Newspapers jointly serving as official medium.** — There is no provision of law authorizing two newspapers to be jointly designated as official medium for a county's legal advertisements. *Rish v. Clements*, 21 Ga. App. 287, 94 S.E. 318 (1917).

**Newspaper need not be mechanically printed in county** the newspaper serves as official organ. *Southeastern Newspapers Corp. v. Griffin*, 245 Ga. 748, 267 S.E.2d 21 (1980).

**Requirement that newspaper have 85 percent paid circulation rate** applies to newspaper chosen and not the newspaper's predecessor before merger which must have only been continuously published and mailed to a list of subscribers for two years. *Southeastern Newspapers Corp. v. Griffin*, 245 Ga. 748, 267 S.E.2d 21 (1980).

**Statutory circulation rate requirement.** — Newspaper failed to statutorily qualify to serve as official legal organ of a county when the newspaper's circulation had fallen below 75 percent paid circulation for approximately 6 months out of the 2-year period prior to designation. *Henry County Record, Inc. v. Cmty. Newspaper Holdings, Inc.*, 274 Ga. 353, 554 S.E.2d 150 (2001).

**Newspaper's failure to publish during Christmas week for previous two years** does not disqualify the newspaper

under this section from being the legal organ of a county. *Williams v. Athens Newspapers, Inc.*, 241 Ga. 274, 244 S.E.2d 822 (1978).

**Challenge by competitor.** — Competing publication could not challenge the status of a legal organ on the ground that the newspaper's paid circulation had dropped below the statutory requirement. *Atlanta Journal v. Clarke*, 269 Ga. 33, 497 S.E.2d 358 (1998).

**When newspaper published outside county preferred.** — Journal or newspaper which has been published and mailed to a bona fide list of subscribers for a period of 20 years, and which for a like period of time has published the official and legal advertisements of the county, though such journal or newspaper be not published in the county, is the official organ of the county, and has a legal right to publish the official and legal advertisements in preference to one which has not been continuously published and mailed to a bona fide list of subscribers for a period of two years, even though such latter journal or newspaper be published in the county. *McGinty v. Chambers*, 182 Ga. 341, 185 S.E. 513 (1936).

**Change in statutory criteria.** — Because the newspaper satisfied the statutory criteria required of legal organs at the time the newspaper was appointed, and the designation process was complete when the criteria was amended in 1997, the amended criteria was inapplicable to the newspaper's designation. *Southern Crescent Newspapers v. Dorsey*, 269 Ga. 41, 497 S.E.2d 360 (1998).

**Cited in** *Champion Box Co. v. Manatee Crate Co.*, 75 F.2d 340 (5th Cir. 1935); *Georgia Cracker v. Hesters*, 193 Ga. 706, 20 S.E.2d 7 (1942); *Dooly v. Gates*, 194 Ga. 787, 22 S.E.2d 730 (1942); *Reed v. Southland Publishing Co.*, 222 Ga. 523, 150 S.E.2d 817 (1966).

## OPINIONS OF THE ATTORNEY GENERAL

**No date is specified upon which choice of organ shall be made**, and a record should be kept of the meeting at which this is done. 1948-49 Op. Att'y Gen. p. 469.

**Changing of organ allowed.** — Ordi-

nary (now probate judge), clerk, and sheriff may change official organ during year. 1948-49 Op. Att'y Gen. p. 469.

**Publication in currently constituted county official organ.** — County commissioner must publish official tax



levy in currently constituted county official organ. 1948-49 Op. Att'y Gen. p. 470.

**Size of circulation irrelevant in choice of official newspaper.** — When two journals or newspapers circulate generally in a county, and both meet the statutory requirements, thereby qualifying for selection as the official organ of the county, the officials, who are designated to select which journal or newspaper shall be the official organ, are not bound by statute to base their selection upon the size of circulation, but are free to choose either. 1960-61 Op. Att'y Gen. p. 311.

**Circulation requirement.** — Official organ for publication of legal advertising must continually have paid circulation of 85 percent. 1962 Op. Att'y Gen. p. 68.

Independent audit must show that a proposed new legal organ has had an 85% paid circulation rate for the 12 months prior to the newspaper being declared the county's official legal organ. 1997 Op. Att'y Gen. No. U97-14.

**Concurrent designation of county organ.** — Ordinary (now probate judge), sheriff, and clerk of superior court have authority to concurrently designate county organ, should it become necessary. 1968 Op. Att'y Gen. No. 68-181.

**Newspaper may be mechanically printed outside county.** — Bona fide

county newspaper which was otherwise qualified under former Code 1933, §§ 39-1101 through 39-1103 and 39-1107 (see now O.C.G.A. §§ 9-13-140 and 9-13-142) may be chosen as the official organ of the county even if the newspaper is mechanically printed outside of the county. 1973 Op. Att'y Gen. No. U73-15.

**County newspaper may be selected by Constitutional Amendments Publications Board** for publishing of general constitutional amendments as provided in former Ga. Const. 1976, Art. XIII, so long as this newspaper is designated as the "official organ of that county." 1976 Op. Att'y Gen. No. 76-71.

**Official publisher may maintain action against official required to publish legal notices.** — For a newspaper which has been properly selected as the official organ of a county, the publisher of that newspaper may maintain an action against the sheriff, the probate judge, or other governmental officers who are required to publish legal or official advertising in a county's official newspaper. 1979 Op. Att'y Gen. No. U79-25.

**All advertisements mandated by law are not required to be published** in official organ of a county. 1979 Op. Att'y Gen. No. U79-25.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 47 Am. Jur. 2d, Judicial Sales, § 28 et seq. 58 Am. Jur. 2d, Newspapers, Periodicals, and Press Associations, §§ 34, 36, 38, 41, 48.

**C.J.S.** — 50A C.J.S., Judicial Sales, § 14 et seq.

**ALR.** — Necessity that newspaper be published in English language to satisfy requirements regarding publication of legal or official notice, 90 ALR 500.

What constitutes newspaper of "general circulation" within meaning of state statutes requiring publication of official notices and the like in such newspaper, 24 ALR4th 822.

Application of requirement that newspaper be locally published for official notice publication, 85 ALR4th 581.

## 9-13-143. Rates for legal advertisements.

(a) The rates to be allowed to publishers for publishing legal advertisements shall be as follows:

(1) For each 100 words, not more than the sum of \$10.00 for each insertion for the first four insertions; and



(2) For each subsequent insertion, not more than the sum of \$9.00 per 100 words.

In all cases fractional parts shall be charged for at the same rates.

(b) For the purpose of the computation in subsection (a) of this Code section, a block of numbers or a block of letters and numbers shall be counted as one word. If the block of numbers or letters or any combination thereof contains a hyphen, a semicolon, a colon, or other similar character or punctuation mark, the block shall still be counted as one word, provided there are no intervening spaces. When an intervening space does occur, this space shall mark the start of a new word.

(c) No judge of the probate court, sheriff, coroner, clerk, marshal, or other officer shall receive or collect from the parties, plaintiff or defendant, other or greater rates than set forth in this Code section. (Ga. L. 1878-79, p. 81, § 1; Code 1882, § 3704a; Civil Code 1895, § 5461; Civil Code 1910, § 6066; Ga. L. 1920, p. 86, § 1; Code 1933, § 39-1105; Ga. L. 1949, p. 566, § 1; Ga. L. 1953, Nov.-Dec. Sess., p. 271, § 2; Ga. L. 1964, p. 77, § 1; Ga. L. 1965, p. 174, § 1; Ga. L. 1968, p. 126, § 1; Ga. L. 1975, p. 52, § 1; Ga. L. 1981, p. 1808, § 1; Ga. L. 1985, p. 1042, § 1; Ga. L. 1989, p. 325, § 1; Ga. L. 1993, p. 91, § 9; Ga. L. 1995, p. 992, § 1; Ga. L. 1996, p. 6, § 9.)

**Cross references.** — Penalty for demand, etc., by judge of probate court, sheriff, etc., for advertising fees in excess of those provided by law, § 45-11-6.

## JUDICIAL DECISIONS

**Multiple tax advertisements published en bloc treated as separate paragraphs.** — When a sheriff has caused to be published a notice of a large number of tax advertisements, written en bloc, with one general heading and one general closing, with the sheriff's name at the end, but set forth in separate paragraphs therein a complete advertisement of property of each defendant in each tax execution, with all necessary jurisdictional facts, each of the paragraphs is a separate and distinct advertisement for

the purpose of computing advertising rates so as to entitle the publisher to collect fees therefor on said paragraphs on the basis that each paragraph is a separate advertisement as per the rates prescribed by this section. *Georgia Cracker v. Hesters*, 193 Ga. 706, 20 S.E.2d 7, answer conformed to, 67 Ga. App. 327, 20 S.E.2d 197 (1942).

**Cited in** *Champion Box Co. v. Manatee Crate Co.*, 75 F.2d 340 (5th Cir. 1935); *Zugar v. Scarbrough*, 186 Ga. 310, 197 S.E. 854 (1938).

## OPINIONS OF THE ATTORNEY GENERAL

**Punctuation marks not considered words.** — This section fixes basis for legal rate on number of "words" and on words only, and in dealing with this section, "punctuation marks" cannot be in any

sense construed as "words." 1948-49 Op. Att'y Gen. p. 32.

In legal advertisements, figures may be charged for but punctuation marks may not. 1948-49 Op. Att'y Gen. p. 33.



**Sale at less than legal rate.** — There is no law prohibiting the sale of legal advertising at less than the legal rate; however, any agreement to charge less than the rate prescribed by law would be in violation of this section. 1948-49 Op. Att'y Gen. p. 469.

**Construction.** — This section must be construed in connection with its companion sections in this part relating to "Judicial Sales." 1958-59 Op. Att'y Gen. p. 181.

**Proposed constitutional amend-**

**ments published at rates specified in section.** — Rate to be paid publishers for publishing proposed constitutional amendments is the rate for publishing legal advertisements specified in this section. 1968 Op. Att'y Gen. No. 68-478.

Constitutional Amendments Publication Board may contract to pay rates in excess of rate authorized by this section when reasonably necessary to provide notice to the people of the proposed amendments. 1974 Op. Att'y Gen. No. 74-127.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 58 Am. Jur. 2d, Newspapers, Periodicals, and Press Associations, § 66 et seq.

**Am. Jur. Pleading and Practice Forms.** — 18B Am. Jur. Pleading and Practice Forms, Newspapers, Periodicals, and Press Associations, § 1.

**C.J.S.** — 66 C.J.S., Newspapers, § 27.

**ALR.** — Steps to be taken by officer before resale upon default of purchaser at judicial or execution sale, 24 ALR 1330.

### 9-13-144. Alternate advertising when rates not agreed on.

(a) If the judge of the probate court, the sheriff, or other officer is unable to procure advertisements at the rate prescribed in Code Section 9-13-143 in a newspaper published at the county site of the county, he may have the advertisements published in any newspaper in this state having the largest general circulation in the county, provided that any paper published in the county shall be next entitled to the public advertisements and provided, further, that the rates shall be agreed upon.

(b) If contracts cannot be made with newspapers at the rates prescribed, then the sheriff and the judge of the probate court or other advertising officers shall post their advertisements at the courthouse and in a public place in each militia district in the county for the length of time required by law for advertising in newspapers. (Ga. L. 1878-79, p. 81, § 3; Code 1882, § 3704c; Civil Code 1895, § 5462; Ga. L. 1899, p. 40, § 1; Civil Code 1910, § 6067; Code 1933, § 39-1104.)

### JUDICIAL DECISIONS

**Cited** in Dollar v. Wind, 135 Ga. 760, 70 S.E. 335 (1911); Rish v. Clements, 21 Ga. App. 287, 94 S.E. 318 (1917); Champion

Box Co. v. Manatee Crate Co., 75 F.2d 340 (5th Cir. 1935); Georgia Cracker v. Hesters, 193 Ga. 706, 20 S.E.2d 7 (1942).



OPINIONS OF THE ATTORNEY GENERAL

Concurrent authority to designate county organ. — Probate judge, sheriff, and clerk of superior court have authority

to concurrently designate county organ, should it become necessary. 1968 Op. Att’y Gen. No. 68-181.

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, Newspapers, Periodicals, and Press Associations, §§ 34, 41, 48.

C.J.S. — 50A C.J.S., Judicial Sales, § 14 et seq.

ALR. — Steps to be taken by officer before resale upon default of purchaser at judicial or execution sale, 24 ALR 1330.

9-13-145. Advertising costs paid in advance; exception when affidavit of indigence filed.

No sheriff or deputy sheriff shall be required to advertise the property of any defendant in execution for sale until the cost of the advertisement shall have been first paid by the plaintiff in execution, his agent, or his attorney, provided that when any such party plaintiff, or his agent or attorney for him, shall make and file an affidavit in writing that because of his indigence he is unable to pay such cost, it shall be the duty of the sheriff or his deputy to proceed as required by law. (Ga. L. 1872, p. 42, § 1; Code 1873, § 3649; Code 1882, § 3649; Civil Code 1895, § 5459; Civil Code 1910, § 6064; Code 1933, § 39-1106.)

JUDICIAL DECISIONS

Newspaper owner may demand fees in advance. Ward v. County of Appling, 80 Ga. 672, 6 S.E. 914 (1888).

sheriff is not liable for damages for not selling the property. Slaton v. Fisher, 145 Ga. 375, 89 S.E. 362 (1916).

When the plaintiff failed to tender costs of advertising to sheriff, the

Cited in Small Equip. Co. v. Walker, 126 Ga. App. 827, 192 S.E.2d 167 (1972).

OPINIONS OF THE ATTORNEY GENERAL

Newspapers may require cash in advance on legal advertising. 1958-59 Op. Att’y Gen. p. 1.

RESEARCH REFERENCES

C.J.S. — 66 C.J.S., Newspapers, § 27.

ALR. — Steps to be taken by officer before resale upon default of purchaser at judicial or execution sale, 24 ALR 1330.



## PART 2

## CONDUCT AND EFFECT

**9-13-160. Time of conducting public sale.**

(a) For the purposes of this Code section, the term “public sale” means any sale, the notice of which must by law in any manner be given to the public.

(b) All public sales conducted within this state shall be between the hours of 10:00 A.M. and 4:00 P.M. eastern standard time or eastern daylight time, whichever is applicable, on the date fixed for the sale. (Ga. L. 1963, p. 366, § 1; Ga. L. 1979, p. 833, § 1.)

**Law reviews.** — For article surveying recent legislative and judicial developments in Georgia’s real property laws, see 31 Mercer L. Rev. 187 (1979).

**JUDICIAL DECISIONS**

**Failure to comply not reversible error.** — Trial court properly denied first tenant in common’s protest on the ground that public sale of the first tenant in common and second tenant in common’s sign, ordered by the trial court, took place one hour before the time allowed for in the statute as the commissioners conducted the sale at the time provided for in the trial court’s order that was produced, proffered, and procured by the first tenant in common and the first tenant in common could not complain about a ruling which the first tenant in common caused. *Caudell v. Toccoa Inn, Inc.*, 261 Ga. App. 209, 582 S.E.2d 180 (2003).

**Sale at courthouse.** — Trial court did not err in denying first tenant in com-

mon’s protest of public sale of sign owned by the first tenant in common and the second tenant in common as the statutory requirement was fulfilled when the sale took place at the county building where the courts were located even though the building was referred to as the “County Government Building,” since that building was the only place where the superior court convened; the statute did not require the sale take place at a building which carried the name “courthouse.” *Caudell v. Toccoa Inn, Inc.*, 261 Ga. App. 209, 582 S.E.2d 180 (2003).

**Cited in** *Oglethorpe Co. v. United States*, 558 F.2d 590 (Ct. Cl. 1977); *Butler v. Forsyth County Bank*, 153 Ga. App. 122, 264 S.E.2d 502 (1980).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 47 Am. Jur. 2d, Judicial Sales, § 39.

**C.J.S.** — 50A C.J.S. Judicial Sales, § 14 et seq.

**9-13-161. Where and when sales under execution held; change of place of public sales by court order.**

(a) Unless otherwise provided, sales of property taken under execution shall be made by the sheriffs or coroners only at the courthouse of the county where the levy was made on the first Tuesday in each month, between the hours of 10:00 A.M. and 4:00 P.M., and at public outcry; provided, however, that, should the first Tuesday of the month fall on



New Year's Day or Independence Day, such sales shall take place on the immediately following Wednesday. A change in the time of such sales from the first Tuesday of the month to the first Wednesday of the month as provided in this subsection shall also apply to all public sales within the county required to be conducted at the time of the sheriff's sales.

(b) In all cases where any sheriff, coroner, or other levying officer shall levy any execution or other legal process upon any corn, lumber, timber of any kind, bricks, machinery, or other articles difficult and expensive to transport, the officer may sell the property without carrying and exposing the same at the courthouse door on the day of sale, but the levying officer shall give a full description of the property and the place where it is located in the advertisement of the sale.

(c) By general order of the presiding judge of the superior court of the county, published in the official newspaper of the county and entered on the minutes of the court, all sales of property under execution within a county may be held at a place other than at the courthouse when, in the opinion of the judge, the holding of such sales before the courthouse door would create an undue traffic hazard or unnecessarily endanger the person or property of persons using the public streets. However, no such property shall be sold at a place different from that shown in the advertisement of the sale. Any change in the place of such sales within any county, as provided in this Code section, shall also apply to all public sales within the county required to be conducted in the manner of sheriff's sales. (Laws 1799, Cobb's 1851 Digest, p. 509; Laws 1821, Cobb's 1851 Digest, p. 511; Code 1863, § 3575; Code 1868, § 3598; Ga. L. 1871-72, p. 49, § 1; Code 1873, § 3646; Code 1882, § 3646; Civil Code 1895, § 5455; Civil Code 1910, § 6060; Code 1933, § 39-1201; Ga. L. 1956, p. 701, § 1; Ga. L. 1990, p. 1731, § 1; Ga. L. 1993, p. 91, § 9.)

**Law reviews.** — For article, "Buying Distressed Commercial Real Estate: What are the Alternatives?," see 16 (No. 4) Ga. St. B.J. 18 (2010).

## JUDICIAL DECISIONS

**This section is constitutional**, and a foreclosure pursuant to the statute does not violate procedural due process rights. *National Community Bldrs., Inc. v. Citizens & S. Nat'l Bank*, 232 Ga. 594, 207 S.E.2d 510 (1974).

**Ordinarily, judicial sales are made at the courthouse** and are for cash. *Jones, Drumright & Co. v. Thacker & Co.*, 61 Ga. 329 (1878).

**Sale not conducted at courthouse must be conducted at place designated** in court order and advertisement

since otherwise it would be easy to conceal the true place of sale and defraud persons seeking to bid. *Warren Co. v. Little River Farms, Inc.*, 125 Ga. App. 332, 187 S.E.2d 568 (1972).

**Beginning sale shortly before prescribed hour will not invalidate sale.** *Gower v. New England Mtg. Sec. Co.*, 152 Ga. 822, 111 S.E. 422 (1922).

**Proviso in subsection (b) of this section was made for benefit of officers**, and not a person who has contracted to deliver the property at the courthouse.



King v. Castlen, 91 Ga. 488, 18 S.E. 313 (1893); Scruggs v. Bennett, 34 Ga. App. 131, 128 S.E. 703 (1925).

**Officer must not lose control of property.** O'Pry v. Kennedy, 86 Ga. 662, 12 S.E. 940 (1891); Johns v. Robinson, 119 Ga. 59, 45 S.E. 727 (1903).

**As to machinery or other articles difficult to transport,** there need be no carrying away in making levy. Champion Box Co. v. Manatee Crate Co., 75 F.2d 340 (5th Cir. 1935).

**Sale voidable when statutory requirements not met.** — Sale at a place other than at the courthouse, and other than that designated in the judicial order and announced in the notice and advertisements, is such an irregularity as renders the sale voidable at the option of one who was thereby deprived of a bid. Warren Co. v. Little River Farms, Inc., 125 Ga. App. 332, 187 S.E.2d 568 (1972).

**In absence of valid sale, execution debtor retains title** to the property. Cargle v. Knox, 143 Ga. 597, 85 S.E. 764 (1915).

**Sheriff in making sale is agent of and acts for defendant in fieri facias** and the proceeds of a sheriff's sale belong to the defendant in fieri facias. Falls v. Fickling, 621 F.2d 1362 (5th Cir. 1980).

**Sale on legal holiday not void.** — Sale of property in this state under the power of sale contained in a deed to secure debt is not void because the sale is had on a legal holiday. Miller Grading Contractors v. Georgia Fed. Sav. & Loan Ass'n, 247 Ga. 730, 279 S.E.2d 442 (1981).

**Mortgagee may purchase mortgaged property at sale** by the mortgagee under a power of sale in the mortgage, if by the terms of the mortgage the mortgagee is expressly authorized to do so. Miller Grading Contractors v. Georgia Fed. Sav. & Loan Ass'n, 247 Ga. 730, 279 S.E.2d 442 (1981).

**Notice of sale by mortgage holder.** — In the absence of a specific provision to that effect, the holder of a mortgage or trust deed with power of sale is not required to give notice of the exercise of the power to a subsequent purchaser or encumbrancer; and the validity of the sale is not affected by the fact that such notice is not given. Miller Grading Contractors v. Georgia Fed. Sav. & Loan Ass'n, 247 Ga. 730, 279 S.E.2d 442 (1981).

**Upon the failure of a purchaser to comply with a high bid,** the property sold at public auction may not be conveyed to the next highest bidder without complying with the terms of O.C.G.A. §§ 9-13-161 and 44-14-162. Little v. Fleet Fin., 224 Ga. App. 498, 481 S.E.2d 552 (1997).

**Cited in** Mathews v. Starr, 68 Ga. 521 (1882); Williams v. Moore & Watkins, 68 Ga. 585 (1882); Garrett v. Crawford, 128 Ga. 519, 57 S.E. 792 (1907); County of DeKalb v. City of Atlanta, 132 Ga. 727, 65 S.E. 72 (1909); Carrington v. Citizens Bank, 140 Ga. 798, 80 S.E. 12 (1913); Bush v. Growers' Fin. Corp., 176 Ga. 99, 167 S.E. 105 (1932); Zugar v. Scarbrough, 186 Ga. 310, 197 S.E. 854 (1938); Citizens Bank v. Lamar County, 187 Ga. 123, 200 S.E. 257 (1938); Gooch v. Citizens & S. Nat'l Bank, 196 Ga. 322, 26 S.E.2d 727 (1943); Sellers v. Johnson, 207 Ga. 644, 63 S.E.2d 904 (1951); Copeland v. Beckham, 87 Ga. App. 34, 73 S.E.2d 34 (1952); Small Equip. Co. v. Walker, 126 Ga. App. 827, 192 S.E.2d 167 (1972); Law v. USDA, 366 F. Supp. 1233 (N.D. Ga. 1973); Roberts v. Cameron-Brown Co., 410 F. Supp. 988 (S.D. Ga. 1975); Wilson v. Citizens Bank, 143 Ga. App. 402, 238 S.E.2d 754 (1977); Sanders v. State, 151 Ga. App. 590, 260 S.E.2d 504 (1979); Geibank Indus. Bank v. Martin, 97 Bankr. 1013 (Bankr. N.D. Ga. 1989).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 47 Am. Jur. 2d, Judicial Sales, §§ 37, 39, 40, 41.

**C.J.S.** — 50A C.J.S., Judicial Sales, § 30 et seq.

**ALR.** — Effect of receipt of advance bid

before confirmation upon the confirmation of judicial sale, 11 ALR 399; 152 ALR 530.

Judicial, execution, or tax sale on election day, holiday, or Sunday, 58 ALR 1273.

Presence of chattels at place of sale as a



condition of a sale by “public auction,” required by statute or ordinance, or of a judicial or execution sale, 69 ALR 1194.

When “sale” deemed to have taken place for purposes of statute of limitations which fixes commencement of period at time of foreclosure sale or other judicial sale, 101 ALR 1348.

Construction, application, and effect of statutory provision requiring seizure and

possession of property before sale for delinquent taxes, 105 ALR 635.

Validity of judicial, execution, tax, or other public sale as affected by the particular point in courthouse or other place identified by notice, or designated by statute or by mortgage or trust deed, at which the sale was made, or by indefiniteness of notice as regards that point, 120 ALR 660.

### **9-13-161.1. Holding of sales of personal property at place other than courthouse; advertisement of general order as to sale location.**

(a) In any county of this state having a population of 600,000 or more according to the United States decennial census of 1990 or any future such census, the chief judge of the superior court shall be authorized and empowered to provide, by general order published in the official newspaper of the county and also in two other newspapers having general circulation in such county and entered upon the minutes of the court, that all sales of personal property by the sheriff of such county may be held at a place other than at the courthouse where, in the opinion of the chief judge, the holding of such sales before the courthouse door would create an undue traffic hazard or unnecessarily endanger the person or property of persons using the public streets.

(b) No such property shall be sold at a place different from that shown in the advertisement of the sale.

(c) After the issuance of the first general order as provided in subsection (a) of this Code section, the chief judge may from time to time change the place of holding such sales by another general order published as provided in subsection (a) of this Code section.

(d) This Code section shall be supplemental to other provisions of law, with a view towards efficient and orderly handling of sheriff’s sales.

(e) Nothing in this Code section shall be construed to affect the time, manner, or place of any sale not made by the sheriff but required to be made at the same time, manner, or place as sheriff’s sales. (Ga. L. 1965, p. 3260, §§ 1-5; Code 1981, § 9-13-161.1, enacted by Ga. L. 1982, p. 2107, § 3; Ga. L. 1992, p. 1229, § 1.)

### **9-13-162. Continuance of sale from day to day.**

Any sheriff, coroner, constable, tax collector, guardian, trustee, or any other officer of this state, when selling property at public sale by virtue of any law of this state, may continue the sale from day to day until the sale is completed, provided that the trustee or other officer has given



notice of the intended continuance in the advertisement of the sale. (Ga. L. 1851-52, p. 242, § 1; Code 1882, § 3646a; Civil Code 1895, § 5456; Civil Code 1910, § 6061; Code 1933, § 39-1202.)

### JUDICIAL DECISIONS

**Officer conducting judicial sale must keep sale open until competent bid is received** or until the officer is satisfied that such a bid will not be offered. *Wachovia Mtg. Co. v. DeKalb County*, 241 Ga. 416, 246 S.E.2d 183 (1978).

**Upon failure of purchaser to com-**

**ply with the purchaser's bid, the sheriff may resell**, within legal hours, on same day, without readvertisement. *Williams v. Barlow*, 49 Ga. 530 (1873); *Humphrey v. McGill*, 59 Ga. 649 (1877); *Wachovia Mtg. Co. v. DeKalb County*, 241 Ga. 416, 246 S.E.2d 183 (1978).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 47 Am. Jur. 2d, Judicial Sales, § 56 et seq.

**C.J.S.** — 50A C.J.S., Judicial Sales, § 30 et seq.

### 9-13-163. Sale of perishable property — When and by whom ordered; where held.

Whenever any personal property which is of a perishable nature or liable to deteriorate from keeping or the keeping of which is attended by expense is levied on by virtue of any fi. fa., attachment, or other process, and the defendant fails to recover possession of the same and it remains in the hands of the levying officer, upon the facts being made plainly to appear to the judge of the court from which the process has issued or to the judge of the superior court of the county or to the judge of the probate court of the county in which the levy has been made during the absence of the judge of the superior court, it shall be the duty of the judge to order a sale of the property. The sale shall be at the usual place of holding sheriff's sales for the county where the property is located. (Ga. L. 1873, p. 48, § 1; Code 1873, § 3648; Ga. L. 1880-81, p. 60, § 1; Code 1882, § 3648; Civil Code 1895, § 5463; Civil Code 1910, § 6068; Code 1933, § 39-1203; Ga. L. 1983, p. 884, § 3-6.)

**Law reviews.** — For note discussing procedures governing execution sales and

the application of the proceeds of the sales, see 12 Ga. L. Rev. 814 (1978).

### JUDICIAL DECISIONS

**Short-order sale is not sale under final judgment.** *Bradley v. GMAC*, 51 Ga. App. 609, 181 S.E. 188 (1935).

**Short-order sale is equitable remedy** provided for the convenience of the parties and preservation of the property.

*Bradley v. GMAC*, 51 Ga. App. 609, 181 S.E. 188 (1935).

**Whenever speedy sale was made under former Code 1933, § 39-1203 (see now O.C.G.A. § 9-13-163) it must affirmatively appear that two days'**



**notice was duly given as to** the applicant's intention to apply for an order of sale, unless the case fell within one of the exceptions specified in former Code 1933, § 39-1204 (see now O.C.G.A. § 9-13-164). *Jackson v. Parks*, 49 Ga. App. 29, 174 S.E. 203 (1934).

**Sale of property under this section would be void if judgment ordering the sale were void**, and such a judgment is void when it is not affirmatively made to appear that the requisite two-day notice had been given, or legally waived. *Hodges v. Cousins*, 88 Ga. App. 645, 77 S.E.2d 83 (1953).

**When perishable property is sold in accordance with this section**, sale divests all liens on the property sold and the liens so divested attach to the money raised by the sale. *Welsh v. Lewis & Son*, 71 Ga. 387 (1883); *Cincinnati Cordage & Paper Co. v. Dodson Printers Supply Co.*, 131 Ga. 516, 62 S.E. 810 (1908); *Davis v. Peagler*, 21 Ga. App. 778, 95 S.E. 268 (1918).

Property which is of a perishable nature may, under proper order, be sold and the liens divested and made to attach to the funds. *Bradley v. GMAC*, 51 Ga. App. 609, 181 S.E. 188 (1935).

**Tax liens not divested.** — When property is sold pursuant to this section, the short-order sale divests liens on the property, and the liens attach to the proceeds of such sale, but this rule will not affect property covered by a tax lien of the state.

*State Revenue Comm'n v. Rich*, 49 Ga. App. 271, 175 S.E. 394 (1934).

**Proceeds of sale credited upon indebtedness.** — When personal property levied upon is afterwards regularly sold by virtue of a so-called short-order sale, the proceeds of the sale, less the costs, should be credited upon the indebtedness due by the defendant in execution. *Jones Motor Co. v. Macon Sav. Bank*, 37 Ga. App. 767, 142 S.E. 199 (1928), *aff'd*, 168 Ga. 805, 149 S.E. 217 (1929).

**Under this section, probate judge is authorized** to issue order in absence of judge of superior court. *Simmons v. Cooledge*, 95 Ga. 50, 21 S.E. 1001 (1894).

**Mortgage foreclosure proceeding that is void ab initio cannot be revived** by a "short-order" proceeding for a sale of the property. *Bacon v. Hansley*, 22 Ga. App. 704, 97 S.E. 101, *cert. denied*, 22 Ga. App. 803 (1918).

**Cited in** *Epstin v. Levenson & Co.*, 79 Ga. 718, 4 S.E. 328 (1887); *Luke v. Gilley*, 18 Ga. App. 327, 89 S.E. 343 (1916); *Chambers v. Planters' Bank*, 161 Ga. 535, 131 S.E. 280 (1926); *Parker & Dunn v. State*, 36 Ga. App. 370, 136 S.E. 800 (1927); *Spires v. Beane*, 46 Ga. App. 843, 169 S.E. 386 (1933); *C.I.T. Corp. v. Carter*, 61 Ga. App. 479, 6 S.E.2d 409 (1939); *Smith v. Beavers*, 62 Ga. App. 535, 8 S.E.2d 719 (1940); *Hodges v. Cousins*, 88 Ga. App. 645, 77 S.E.2d 83 (1953); *James Talcott, Inc. v. De Witt*, 216 Ga. 366, 116 S.E.2d 563 (1960); *Johnson v. American Credit Co.*, 581 F.2d 526 (5th Cir. 1978).

## RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 15A Am. Jur. Pleading and Practice Forms, Judicial Sales, § 1.

**C.J.S.** — 50A C.J.S., Judicial Sales, § 30 et seq.

**ALR.** — Construction and effect of pro-

vision for execution sale on short notice, or sale in advance of judgment under writ of attachment, where property involved is subject to decay or depreciation, 3 ALR3d 593.

### 9-13-164. Sale of perishable property — Advertisement; notice; disposition of proceeds.

(a) The time and place of holding a sale under Code Section 9-13-163 shall be advertised at the courthouse and at two other public places at least ten days before the day of sale.



(b) The judge or judge of the probate court may order a sale of livestock, fruit, or other personal property in a perishable condition, after three days' notice.

(c) No judicial officer shall grant any order for the sale of personal property where the defendant in execution or other process or his attorney has not had at least two days' notice of applicant's intention to apply for such order, which notice shall specify the time and place of hearing. In cases of attachment for purchase money falling within this Code section, like notice shall be furnished the plaintiff or his attorney. In no case shall the notice be dispensed with, except where it is made to appear that it is impracticable to have the notice perfected or where the case is an urgent one, in which latter event the court may, in the exercise of a sound discretion, grant the order without notice.

(d) The money arising from the sale shall be held by the officer making the same, subject to the order of the court having jurisdiction of the same. (Ga. L. 1873, p. 48, § 1; Code 1873, § 3648; Ga. L. 1880-81, p. 60, § 1; Code 1882, § 3648; Civil Code 1895, § 5464; Civil Code 1910, § 6069; Code 1933, § 39-1204; Ga. L. 1983, p. 884, § 3-7.)

**Law reviews.** — For note discussing the application of the proceeds of the procedures governing execution sales and sales, see 12 Ga. L. Rev. 814 (1978).

### JUDICIAL DECISIONS

**Livestock includes mule** and may be properly classed as property that is expensive to keep, or "livestock, fruit or other personal property in a perishable condition." *Jackson v. Parks*, 49 Ga. App. 29, 174 S.E. 203 (1934).

**Two days' notice of intention to apply for sale order.** — It must affirmatively appear that two days' notice of intention to apply for sale order was duly given, unless the case falls within one of the exceptions specified in this section. *Jackson v. Parks*, 49 Ga. App. 29, 174 S.E. 203 (1934).

**Sale of property under provisions of this section would be void** if judgment ordering sale were void, and such a judgment is void when it is not affirmatively made to appear that the requisite two-day notice had been given, or legally waived. *Hodges v. Cousins*, 88 Ga. App. 645, 77 S.E.2d 83 (1953).

**Mere failure of sheriff to advertise**

**sale for requisite full ten days.** — Provisions of law governing the advertisement of the property for a particular time or in a particular way are merely directory to the sheriff, and any such neglect on the sheriff's part may subject the sheriff to a suit for damages at the instance of the party injured, but does not affect the title of the purchaser unless there was actual fault on the purchaser's part, such as collusion between the purchaser and the sheriff. *Hodges v. Cousins*, 88 Ga. App. 645, 77 S.E.2d 83 (1953).

**Cited in** *Parker & Dunn v. State*, 166 Ga. 256, 142 S.E. 879 (1928); *Spires v. Beane*, 46 Ga. App. 843, 169 S.E. 386 (1933); *State Revenue Comm'n v. Rich*, 49 Ga. App. 271, 175 S.E. 394 (1934); *Smith v. Beavers*, 62 Ga. App. 535, 8 S.E.2d 719 (1940); *Hodges v. Cousins*, 88 Ga. App. 645, 77 S.E.2d 83 (1953); *James Talcott, Inc. v. De Witt*, 216 Ga. 366, 116 S.E.2d 563 (1960).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 47 Am. Jur. 2d, Judicial Sales, § 56 et seq.

**C.J.S.** — 50A C.J.S., Judicial Sales, § 14 et seq., 30 et seq.

**ALR.** — Construction and effect of pro-

vision for execution sale on short notice, or sale in advance of judgment under writ of attachment, where property involved is subject to decay or depreciation, 3 ALR3d 593.

**9-13-165. Sale of perishable property — Under tax executions.**

Whenever a tax fi. fa. is levied on property which is of a perishable nature or is liable to deteriorate in value from keeping or which is attended with expense in keeping, the same may be sold under Code Sections 9-13-163 and 9-13-164. (Ga. L. 1873, p. 48, § 1; Code 1882, § 3648a; Civil Code 1895, § 5465; Civil Code 1910, § 6070; Code 1933, § 39-1205; Ga. L. 1983, p. 884, § 3-8.)

## RESEARCH REFERENCES

**C.J.S.** — 50A C.J.S., Judicial Sales, § 30 et seq.

**ALR.** — Construction and effect of provision for execution sale on short notice, or

sale in advance of judgment under writ of attachment, where property involved is subject to decay or depreciation, 3 ALR3d 593.

**9-13-166. Form of tender.**

Purchasers at judicial sales need not tender cash but, as an alternative, may tender a cashier's or certified check which is drawn for the amount of the purchase price and which is issued by or certified by any financial institution insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation. (Ga. L. 1976, p. 367, § 1.)

## JUDICIAL DECISIONS

**Refusal to confirm sale was error.** — Trial court's refusal to confirm a judicial sale was reversed as a cashier's check tendered by a buyer was the statutory and functional equivalent of a cash payment; because of the plain language and purpose of O.C.G.A. § 9-13-166, the unsuccessful bidders should not have been confused; further, the unsuccessful bidders did not

have any more cash available and could not have obtained a cashier's check for any more than the amount they bid; any confusion as to the appropriate method of payment made no difference in the outcome. *Upchurch v. Chaney*, 280 Ga. 891, 635 S.E.2d 124 (2006).

**Cited in** *Buffington v. Sigler*, 259 Ga. 478, 383 S.E.2d 876 (1989).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 47 Am. Jur. 2d, Judicial Sales, § 131 et seq.

**C.J.S.** — 50A C.J.S., Judicial Sales, § 59 et seq.

**ALR.** — Conditional bid at judicial or execution sale, 104 ALR 632.

Propriety of accepting check or promissory note in satisfaction of bid at execu-



tion or judicial sale had for cash, 86 ALR2d 292.

### 9-13-167. Purchaser to ascertain title and condition; under what conditions officer personally liable.

(a) The purchaser shall look for himself as to the title and soundness of all property sold under judicial process.

(b) Actual fraud or misrepresentation by the officer or his agent may bind the officer personally. No covenant of warranty shall bind him individually unless made with that intention and for a valuable consideration. (Ga. L. 1853-54, p. 56, § 1; Code 1863, § 2578; Code 1868, § 2580; Code 1873, § 2622; Code 1882, § 2622; Civil Code 1895, § 5449; Civil Code 1910, § 6054; Code 1933, § 39-1307.)

## JUDICIAL DECISIONS

**Purpose of this section** is merely to give notice that sheriff's sale does not pass title to property not owned by the defendant in fieri facias even though it be actually included in the sale, unless under other facts and circumstances the true owner is estopped from asserting the owner's own title. *Brooks v. Guthrie*, 42 Ga. App. 296, 155 S.E. 793 (1930).

**Applicability of caveat emptor doctrine.** — First sentence of this section makes doctrine of caveat emptor apply to judicial sales. But a purchaser is not affected by secret equities between the parties. *Johnson v. Equitable Sec. Co.*, 114 Ga. 604, 40 S.E. 787 (1902); *Equitable Loan & Sec. Co. v. Lewman*, 124 Ga. 190, 52 S.E. 599 (1905); *Scarborough v. Holder*, 127 Ga. 256, 56 S.E. 293 (1906).

Caveat emptor applies to judicial sales. *Milam v. Adams*, 216 Ga. 440, 117 S.E.2d 343 (1960).

Rule of caveat emptor applies to administrator's sales. *Moore v. Hartford Accident & Indem. Co.*, 102 Ga. App. 514, 117 S.E.2d 206 (1960).

Doctrine of caveat emptor is applicable when purchaser at sheriff's sale gets defective title, and also when no title to the property sold passes to the purchaser, the sheriff's sale being void on account of a grossly excessive levy. *Brady v. Smotherman*, 51 Ga. App. 480, 180 S.E. 862 (1935).

**Purchaser at tax sale comes within rule of caveat emptor**, and is chargeable

with knowledge of defects which the record discloses, notwithstanding statements of individuals. *Pittman Constr. Co. v. City of Marietta*, 177 Ga. 573, 170 S.E. 669 (1933); *Timpson v. Simmons*, 188 Ga. App. 793, 374 S.E.2d 356 (1988).

**Purchaser at judicial sale must keep one's eyes open, and look personally** as to the state of title the purchaser will obtain by the sale. The execution dockets and other records are open to the purchaser; and it is the purchaser's duty, if the purchaser wishes to be protected, to ascertain the status of the title. *Kurfees v. Davis*, 178 Ga. 429, 173 S.E. 157 (1934).

**Purchaser must at the purchaser's peril ascertain that officer has competent authority to sell** under prescribed forms. *Brady v. Smotherman*, 51 Ga. App. 480, 180 S.E. 862 (1935).

**Purchaser must personally determine the validity of judgment and execution issued thereon**, the levy made by the sheriff, and the sale or deed of the property. The purchaser buys at the purchaser's peril insofar as the judgment, the levy, and the deed are concerned; and when the deed conveys no title because the defendant in fi. fa. has no leviable interest in the property, the purchaser acquires no title. *Milam v. Adams*, 216 Ga. 440, 117 S.E.2d 343 (1960); *May v. Macioce*, 191 Ga. App. 491, 382 S.E.2d 198 (1989).



**Purchaser must take such title as examination of proceedings will show that the purchaser can get** and is bound to ascertain personally beforehand what title the purchaser will obtain by the sale. *Kurfees v. Davis*, 178 Ga. 429, 173 S.E. 157 (1934).

**Fraud as prerequisite to repudiation.** — Purchaser cannot repudiate a bid when there is defective title or no title, unless there is fraud, and a purchaser at a judicial sale is bound to look to the judgment, the levy, and the deed. *Brady v. Smotherman*, 51 Ga. App. 480, 180 S.E. 862 (1935).

Purchaser of land at a sheriff's sale under an execution is bound by the doctrine of caveat emptor; and when the levy under the execution is grossly excessive and the sale is declared void and the sheriff's deed canceled, the purchaser gets no title, but the purchaser cannot maintain an action against the sheriff for the purchase money paid if that officer has turned it over to the plaintiff in execution, and if there was no actual fraud or misrepresentation on the part of the sheriff.

*Brady v. Smotherman*, 51 Ga. App. 480, 180 S.E. 862 (1935).

Purchaser seeking equitable relief from judicial sale would be obliged to show actual fraud or mistake, unaffected by the purchaser's own negligence, of a character so gross as to amount to fraud. *Kurfees v. Davis*, 178 Ga. 429, 173 S.E. 157 (1934).

**Court of equity cannot relieve purchaser, if to do so would be to prejudicially affect rights of any one.** *Kurfees v. Davis*, 178 Ga. 429, 173 S.E. 157 (1934).

**Cited** in *Worthy v. Johnson*, 8 Ga. 236 (1850); *McWhorter v. Beavers*, 8 Ga. 300 (1850); *Methvin v. Bexly*, 18 Ga. 551 (1855); *Dotterer v. Pike*, 60 Ga. 29 (1878); *Colbert v. Moore*, 64 Ga. 502 (1880); *Kenner v. Connally*, 22 Ga. App. 94, 95 S.E. 308 (1918); *Franklin Mtg. Co. v. McDuffie*, 43 Ga. App. 604, 159 S.E. 599 (1931); *Harris Orchard Co. v. Tharpe*, 177 Ga. 547, 170 S.E. 811 (1933); *Pan-American Life Ins. Co. v. Orr*, 49 Ga. App. 257, 175 S.E. 32 (1934); *Milam v. Adams*, 216 Ga. 440, 117 S.E.2d 343 (1960).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 47 Am. Jur. 2d, Judicial Sales, §§ 71, 155 et seq.

**C.J.S.** — 50A C.J.S., Judicial Sales, §§ 87, 88.

**ALR.** — Effect of destruction of or damage to property after judicial or execution sale on rights and liability of successful bidder, 25 ALR 71.

Remedy for fraud preventing redemption from judicial sale, 44 ALR 690.

Doctrine of caveat emptor as applied to

purchaser at judicial or executor's sale, 68 ALR 659.

Rights and remedies of one purchasing at judicial or execution sale where there was misrepresentation or mistake as to acreage or location of boundaries of tract sold, 69 ALR2d 254.

Right of purchaser at execution sale, upon failure of title, to reimbursement or restitution from judgment creditor, 33 ALR4th 1206.

## 9-13-168. Obligations of purchaser.

The purchaser at a judicial sale shall not be bound to look to the appropriation of the proceeds of the sale nor to the returns made by the officer, nor shall he be required to see that the officer has complied fully with all regulations prescribed in such cases. All such irregularities shall create questions and liabilities between the officer and the parties interested in the sale. An innocent purchaser shall be bound only to see that the officer has competent authority to sell and that he is apparently proceeding to sell under the prescribed forms. (Orig. Code 1863, § 2584; Code 1868, § 2586; Code 1873, § 2628; Code 1882, § 2628;



Civil Code 1895, § 5454; Civil Code 1910, § 6059; Code 1933, § 39-1311.)

### JUDICIAL DECISIONS

**First two sentences of this section protect innocent purchaser from secret equity.** Johnson v. Equitable Sec. Co., 114 Ga. 640, 40 S.E. 787 (1902).

**Innocent purchaser is protected though execution is not returned.** Brooks v. Rooney, 11 Ga. 423 (1852).

**Innocent purchaser was not chargeable with sheriff's neglect to advertise** as required by former Code 1933, § 39-1101 (see now O.C.G.A. § 9-13-140); the purchaser was only required to see, pursuant to former Code 1933, § 39-1311 (see now O.C.G.A. § 9-13-168), that the officer has authority to sell, and that the officer is apparently proceeding under the prescribed forms, and the title of such an innocent purchaser is not affected by the sheriff's failure to advertise the sale. Dooley v. Bohannon, 191 Ga. 7, 11 S.E.2d 188 (1940).

Mere failure of the sheriff to advertise the sale for the requisite full ten days under the provisions of former Code 1933, § 39-1204 (see now O.C.G.A. § 9-13-164) would not of itself render the sale void. The provisions of law governing the advertisement of the property for a particular time or in a particular way are merely directory to the sheriff, and any such neglect on the sheriff's part may subject the sheriff to a suit for damages at the instance of the party injured, but does not affect the title of the purchaser unless there was actual fault on the purchaser's part, such as collusion between the purchaser and the sheriff. Hodges v. Cousins, 88 Ga. App. 645, 77 S.E.2d 83 (1953).

**Last sentence of this section imposes duty on purchaser** to see that judgment and levy are complete. Jones v. Easley, 53 Ga. 454 (1873).

**Purchaser must personally determine the validity of judgment** and execution issued thereon, the levy made by the sheriff, and the sale or deed of the property. The purchaser buys at the purchaser's peril insofar as the judgment, the

levy, and the deed are concerned. Milam v. Adams, 216 Ga. 440, 117 S.E.2d 343 (1960); May v. Macioce, 191 Ga. App. 491, 382 S.E.2d 198 (1989).

**Caveat emptor applies to judicial sales.** Milam v. Adams, 216 Ga. 440, 117 S.E.2d 343 (1960).

In all judicial sales in Georgia, the doctrine of caveat emptor applies: that the purchaser at such a sale must at the purchaser's peril ascertain that the officer making the sale has competent authority to sell under prescribed forms, that such purchaser cannot repudiate a bid when there is a defective title or no title at all, unless there is fraud, and that a purchaser at such a sale is bound to look to the judgment, the levy, and the deed. Brady v. Smotherman, 51 Ga. App. 480, 180 S.E. 862 (1935).

Doctrine of caveat emptor is applicable when the purchaser at a sheriff's sale gets a defective title, and also when no title to the property sold passes to the purchaser, the sheriff's sale being void on account of a grossly excessive levy. Brady v. Smotherman, 51 Ga. App. 480, 180 S.E. 862 (1935).

**Judicial sale which is declared void passes no title to purchaser.** Brady v. Smotherman, 51 Ga. App. 480, 180 S.E. 862 (1935).

**Purchaser acquires no title if deed conveys no title** because defendant in fieri facias has no leviable interest in property. Milam v. Adams, 216 Ga. 440, 117 S.E.2d 343 (1960).

**Sale is invalid when court ordering sale had no jurisdiction.** Walker v. Morris, 14 Ga. 323 (1853).

**Purchaser at sheriff's sale acquires no title if sheriff has no authority to sell.** Bell v. Chandler, 23 Ga. 356 (1857).

**Misdescription in levy upon land does not render levy void** if the land can be readily identified. Boggess v. Lowrey, 78 Ga. 539, 3 S.E. 771 (1887); Burson v. Shields, 160 Ga. 723, 129 S.E. 22 (1925).



**Failure of officer levying on real estate to give tenant written notice** does not affect title acquired by a bona fide purchaser under such levy; an innocent purchaser is bound only to see that the officer has competent authority to sell and that the officer is apparently proceeding to sell under the prescribed form. *Clark v.*

*C.T.H. Corp.*, 181 Ga. 710, 184 S.E. 592 (1936).

**Cited** in *Dotterer v. Pike*, 60 Ga. 20 (1878); *Brunswick Sav. & Trust Co. v. National Bank*, 102 Ga. 776, 29 S.E. 688 (1898); *Copelan v. Kimbrough*, 149 Ga. 683, 102 S.E. 162 (1920); *Holt v. Laurens*, 193 Ga. 136, 17 S.E.2d 571 (1941).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 47 Am. Jur. 2d, Judicial Sales, § 94 et seq.

**C.J.S.** — 50A C.J.S., Judicial Sales, §§ 87, 88.

### 9-13-169. Note or memorandum unnecessary.

No note or memorandum in writing shall be necessary to charge any person at a judicial sale. (Laws 1831, Cobb's 1851 Digest, p. 514; Code 1863, § 2577; Code 1868, § 2579; Code 1873, § 2621; Code 1882, § 2621; Civil Code 1895, § 5448; Civil Code 1910, § 6053; Code 1933, § 39-1306.)

### JUDICIAL DECISIONS

**This section applies to administrator's sale made under order of court.** *Green v. Freeman*, 126 Ga. 274, 55 S.E. 45 (1906).

**Section does not apply to a sale by administrator under power conferred by deed.** *Davis v. Davis*, 28 Ga. App. 306, 110 S.E. 919 (1922).

**This section does not apply to sale under power conferred by mortgage.** *Seymour v. National Bldg. & Loan Ass'n*, 116 Ga. 285, 42 S.E. 518 (1902).

**Cited** in *James v. Safari Enters., Inc.*, 244 Ga. App. 813, 537 S.E.2d 103 (2000).

### RESEARCH REFERENCES

**C.J.S.** — 50A C.J.S., Judicial Sales, § 59 et seq.

### 9-13-170. Liability for purchase money; officer's collection options.

(a) Any person who becomes the purchaser of any real or personal property at any sale made at public outcry by any executor, administrator, or guardian or by any sheriff or other officer under and by virtue of any execution or other legal process, who fails or refuses to comply with the terms of the sale when requested to do so, shall be liable for the amount of the purchase money. It shall be at the option of the sheriff or other officer either to proceed against the purchaser for the full amount of the purchase money or to resell the real or personal property and then proceed against the first purchaser for any deficiency arising from the sale.



(b) The action provided for in subsection (a) of this Code section may be brought in the name of the sheriff or other officer making the sale for the use of the plaintiff or defendant in execution or any other person in interest, as the case may be. (Laws 1831, Cobb's 1851 Digest, p. 514; Code 1863, §§ 3582, 3583; Code 1868, §§ 3605, 3606; Code 1873, §§ 3655, 3656; Code 1882, §§ 3655, 3656; Civil Code 1895, §§ 5466, 5467; Civil Code 1910, §§ 6071, 6072; Code 1933, §§ 39-1301, 39-1302; Ga. L. 1982, p. 3, § 9.)

### JUDICIAL DECISIONS

**This section grants to officer right to sell property and sue for deficiency**, rather than bring suit for the entire purchase price. *Collier v. Perkerson*, 31 Ga. 117 (1860); *Oliver v. State*, 66 Ga. 602 (1881).

**This section does not apply when second sale was under older executions.** *Barlow v. Toole*, 80 Ga. 9, 5 S.E. 246 (1887).

**This section does not apply when only part of property is resold.** *Smith v. Roberts*, 106 Ga. 409, 32 S.E. 375 (1899).

**Bidder takes risk when the bidder refuses to comply with the bid and lets the property be sold again**, in that the bidder takes the chance of the property bringing more or less than the bidder, thus eliminating or increasing the bidder's liability. *Womack v. Tidewell*, 38 Ga. App. 232, 143 S.E. 620 (1928).

**Plaintiff and defendant in execution have same rights under subsection (b) of this section.** *Cureton v. Wright*, 73 Ga. 8 (1884).

**Resale must be made as soon as practicable.** *Saunders v. Bell*, 56 Ga. 442 (1876); *Roberts v. Smith*, 137 Ga. 30, 72 S.E. 410 (1911); *Hardin v. Adair*, 140 Ga. 263, 78 S.E. 1073 (1913).

**It is questionable whether executor or administrator could elect to resell after delay of 13 months** at the instance

of the purchaser. *Peek v. Peek*, 166 Ga. 166, 142 S.E. 663 (1928).

**Sheriff cannot give bidder certain time to raise money.** *Willbanks v. Untriner*, 98 Ga. 801, 25 S.E. 841 (1896); *Wood v. Henry*, 107 Ga. 389, 33 S.E. 410 (1899).

**Notice of resale may be given on day of original sale.** *Suttles v. Sewell*, 109 Ga. 707, 35 S.E. 224 (1900); *Brockhan v. Hirsch*, 128 Ga. 819, 58 S.E. 468 (1907).

**Notice of resale need not state that original bidder is held liable for deficiency.** *Gay v. Parish*, 138 Ga. 399, 75 S.E. 323 (1912).

**Agent who bid for purchaser need not be made party to action against the purchaser.** *Sproull v. Seay*, 74 Ga. 676 (1885).

**To charge purchaser at first sale, sheriff would have to show that second sale was consummated.** *Hicks v. Ayer*, 5 Ga. 298 (1848); *Orr v. Brown*, 5 Ga. 400 (1848); *Henderick v. Davis*, 27 Ga. 167 (1859).

**Cited in** *Morgan v. Wolpert*, 164 Ga. 462, 139 S.E. 15 (1927); *Zugar v. Scarbrough*, 186 Ga. 310, 197 S.E. 854 (1938); *Sims v. Ramsey*, 186 Ga. 732, 198 S.E. 770 (1938); *Citizens Bank v. Lamar County*, 187 Ga. 123, 200 S.E. 257 (1938); *Allen v. Bemis*, 193 Ga. 556, 19 S.E.2d 516 (1942); *Timpson v. Simmons*, 188 Ga. App. 793, 374 S.E.2d 356 (1988).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 47 Am. Jur. 2d, Judicial Sales, §§ 135 et seq., 141 et seq.

**Am. Jur. Pleading and Practice Forms.** — 15A Am. Jur. Pleading and Practice Forms, Judicial Sales, § 70.

**C.J.S.** — 50A C.J.S., Judicial Sales, § 59 et seq.

**ALR.** — Grounds, other than resale or defective title or irregularity in sale, for relief of successful bidder at judicial sale



from obligation to comply with bid, 63 ALR 974.

Conclusiveness on purchaser at judicial sale of provisions of order or decree of confirmation regarding terms and conditions, 95 ALR 1492.

Attack upon judgment by purchasers at judicial sale for purpose of preventing

confirmation, or otherwise relieving them from the obligation assumed, 174 ALR 538.

Enforceability as between the parties of agreement to purchase property at judicial or tax sale for their joint benefit, 14 ALR2d 1267.

### 9-13-171. When defendant bound by sale under void process.

Where property is sold under void process and the proceeds are applied to valid liens against the defendant or the defendant receives the benefit thereof, he shall be bound thereby if he is present and does not object to the sale. (Civil Code 1895, § 5472; Civil Code 1910, § 6077; Code 1933, § 39-1315.)

**History of Code section.** — The language of this Code section is derived in part from the decisions in *Tribble v. An-*

*derson*, 63 Ga. 31 (1878); *Reichert v. Voss*, 78 Ga. 54, 2 S.E. 558 (1886) and *O'Kelley v. Gholston*, 89 Ga. 1, 15 S.E. 123 (1892).

### JUDICIAL DECISIONS

**This section may apply to sale under execution issued by clerk without authority.** *Torbert v. Collier*, 141 Ga. 700, 81 S.E. 1103 (1914).

**Origin in doctrine of equitable estoppel.** — Principle underlying this section had its origin in doctrine of equitable estoppel, and, in construing it, it should be given that meaning which will accomplish the object and purpose intended to be effected by equitable estoppel. *Greenwood v. McGee*, 48 Ga. App. 578, 173 S.E. 468 (1934).

**Estoppel arises when the defendant knowingly accepts purchase money, or directs its payment to another creditor.** *Parks v. Williams*, 137 Ga. 578, 73 S.E. 839 (1912).

Defendant in execution may estop oneself from denying the validity of the sale by knowingly accepting a balance of the purchase money left in the hands of the officer after discharging the executions of the plaintiff in attachment, or directing its payment to another creditor, under a settlement with that creditor. *Greenwood v. McGee*, 48 Ga. App. 578, 173 S.E. 468 (1934).

**Since the defendant was present at the sale and made no objection, the**

defendant thereby waived the right to afterwards deny the validity of the sale. *Greenwood v. McGee*, 48 Ga. App. 578, 173 S.E. 468 (1934).

**Defendant bound by sale.** — When a levy entered on a fieri facias was void for uncertainty, and when the defendant in execution was present at the sale and mentally competent to consent to the sale, and did consent, and got the benefit of it in the application of the proceeds to valid judgments against the defendant, the defendant's administrator, as well as defendant personally, would be bound thereby. *Greenwood v. McGee*, 48 Ga. App. 578, 173 S.E. 468 (1934).

If a judgment is executed by selling the property levied on, and the defendant in execution stands by and sees the property sold and helps sell the property, the defendant is bound, not because the sale was a valid one, but because the defendant had stood by and allowed an innocent party to purchase the property without any notice on the defendant's part. *Greenwood v. McGee*, 48 Ga. App. 578, 173 S.E. 468 (1934).

**Defendant estopped from complaining of illegal levy.** — One whose personal property was levied upon under



an illegal or void process, and who not only failed to take any steps to prevent its sale thereunder, but, by one's attorney, consented to an order of court directing a speedy sale, and who was present at the sale, making no objection, and either then or previously informed others that the purchaser at the sale would get a good title, was estopped from complaining of the illegal levy and denying the validity of the sale, though one gave no express consent to the sale. *Greenwood v. McGee*, 48 Ga. App. 578, 173 S.E. 468 (1934).

**Defendant estopped from recovering property or value from purchaser.** — When a defendant's property is levied on and properly advertised, and the defendant voluntarily brings the property to the place of sale and stands by and sees the property sold, without giving notice or raising any objection, the defendant is estopped from recovering the property or the property's value from the purchaser, though the officer as such had no legal authority to sell. *Greenwood v. McGee*, 48 Ga. App. 578, 173 S.E. 468 (1934).

**Defendant may not bring ejectment action.** — When the execution is based upon the foreclosure of a mortgage on the property sold, and the defendant, who is present at the sale, knows the fact that the execution was not signed, and makes no objection to the sale on that account,

and when, after the purchase of the property at such sale by the plaintiff in fieri facias, the defendant surrenders possession to the plaintiff, who afterwards conveys the property to an innocent purchaser for value, the defendant is bound by the sale and cannot maintain an action of ejectment for the recovery of the property on account of the property's sale under void process. *Greenwood v. McGee*, 48 Ga. App. 578, 173 S.E. 468 (1934).

**When price result of collusion between plaintiff and defendant.** — When a plaintiff and the defendant in fieri facias make an agreement to depress the bidding at a sheriff's sale under the execution, whereby the plaintiff or a person designated by the plaintiff is to become the purchaser, although such an agreement is illegal as contrary to public policy, the defendant in fieri facias will not thereafter be heard to attack the validity of the sale by cancelling the sheriff's deed made in pursuance of the sale under such agreement on account of the consequent inadequacy of the purchase price unless the defendant is of weak mind and advantage is taken of this fact. *Guthrie v. Gaskins*, 184 Ga. 537, 192 S.E. 36 (1937).

**Cited in** *Gibbs v. Golden Live Stock Co.*, 40 Ga. App. 808, 151 S.E. 556 (1930); *Henry v. Slack*, 86 Ga. App. 198, 71 S.E.2d 96 (1952).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 47 Am. Jur. 2d, Judicial Sales, § 227 et seq.

**C.J.S.** — 50A C.J.S., Judicial Sales, § 128.

**ALR.** — Estoppel of or waiver by parties or participants regarding irregularities or defects in execution or judicial sale, 2 ALR2d 6.

### 9-13-172. When execution sale set aside.

Courts shall have full power over their officers making execution sales. Whenever the court is satisfied that a sale made under process is infected with fraud, irregularity, or error to the injury of either party, the court shall set aside the sale. (Civil Code 1895, § 5427; Civil Code 1910, § 6032; Code 1933, § 39-1316.)

**History of Code section.** — The language of this Code section is derived in part from the decision in *Parker v. Glenn*, 72 Ga. 637 (1884).

**Law reviews.** — For note discussing legal and equitable relief from execution available to debtors, see 12 Ga. L. Rev. 814 (1978).



## JUDICIAL DECISIONS

**This section gives to court full power over the court's officers making judicial sale.** The same authority further authorizes the court to set aside such sale whenever the sale is infected with fraud, irregularity, or error. *Parker v. Glenn*, 72 Ga. 637 (1884).

Courts have full power over their officers and their acts in making execution sales so far as to correct wrongs and abuses, errors, irregularities, mistakes, omissions, and frauds. *Wachovia Mtg. Co. v. DeKalb County*, 241 Ga. 416, 246 S.E.2d 183 (1978).

**Court upon whose judgment execution issues has full power to set aside sale** whenever the ends of justice and fair dealing require it, and to order a resale, or award execution anew at the court's discretion. *Johnson v. Dooly*, 72 Ga. 297 (1884); *Suttles v. Sewell*, 109 Ga. 707, 35 S.E. 224 (1900).

Whenever courts are satisfied that a sale made under process is infected with fraud, irregularity, or error, to the injury of either party, or that the officer selling is guilty of any wrong, irregularity, or breach of duty, to the injury of the parties in interest, or either or any of them, the sale will be set aside; and so also when there has been a willful disregard of the law as to the manner of selling. *Wachovia Mtg. Co. v. DeKalb County*, 241 Ga. 416, 246 S.E.2d 183 (1978).

**Any contemplated fraud, irregularity, or error on the officer's part may, upon proper proceeding, be prevented.** *Fears v. State*, 102 Ga. 274, 29 S.E. 463 (1897); *Suttles v. Sewell*, 109 Ga. 707, 35 S.E. 224 (1900); *Smith v. Georgia Loan & Trust Co.*, 114 Ga. 189, 39 S.E. 846 (1901); *Stark v. Cummings*, 119 Ga. 35, 45 S.E. 722 (1903); *Ruis v. Branch*, 138 Ga. 150, 74 S.E. 1081 (1912).

**Inadequacy of price alone is not sufficient to set aside sale**, unless coupled with other circumstances, such as fraud, mistake, misapprehension, surprise, or collusion. *McInvale v. Walter E. Heller & Co.*, 116 Ga. App. 71, 156 S.E.2d 371 (1967).

Mere inadequacy of price is not of itself sufficient ground for setting aside a sale,

but when coupled with other circumstances showing fraud, accident, or mistake tending to bring about such inadequacy a sufficient reason is presented. *Warren Co. v. Little River Farms, Inc.*, 125 Ga. App. 332, 187 S.E.2d 568 (1972); *Small Equip. Co. v. Walker*, 126 Ga. App. 827, 192 S.E.2d 167 (1972).

Inadequacy of the price alone is not enough to cause the sale to be set aside. There must also be a showing of "fraud, irregularity, or error to the injury of either party." *Wilson v. Citizens Bank*, 143 Ga. App. 402, 238 S.E.2d 754 (1977).

**Sale of subdividable land for grossly inadequate amount** without officer's offering to sell land in parcels is void. *Pierce v. Gaskins*, 168 Ga. App. 446, 309 S.E.2d 658 (1983).

**Allegations that sheriff misled plaintiff's attorneys as to time of foreclosure sale** may be insufficient grounds to set aside the sale, unless it appears that the purchaser knew of or had some hand in the misleading. *American Sec. Inv. Co. v. Poppell*, 114 Ga. App. 268, 150 S.E.2d 697 (1966).

**Sale at improper place voidable.** — Sale at a place other than at the court house, and other than that designated in the judicial order and announced in the notice and advertisements, is such an irregularity as renders the sale voidable at the option of one who was thereby deprived of a bid. *Warren Co. v. Little River Farms, Inc.*, 125 Ga. App. 332, 187 S.E.2d 568 (1972).

**Defect in notice of sale not preserved for review.** — As a purchaser of property at a tax sale failed to raise a claim of error in a summary judgment motion regarding an erroneously listed record owner of property in the notice of tax sale, such claim of error was waived on appeal; further, any such defect in the notice warranted an award of damages under O.C.G.A. § 9-13-172, but did not warrant setting aside the deed as requested by the purchaser. *Hash Props., LLC v. Conway*, 298 Ga. App. 241, 679 S.E.2d 799 (2009).

**Second unauthorized tax sale did not affect fee simple title of buyer at**



**first tax sale.** — Although a county did not have the recognized statutory option of conducting a second tax sale in order to satisfy the remainder of the tax deficiency owed, and while the assignee who took the property as a result of the second tax sale might be entitled to a refund of the purchase price, the special master's recommendation to issue a decree of fee simple title in the underlying property to the buyer at the first tax sale was upheld on

appeal. *DRST Holdings, Ltd. v. Agio Corp.*, 282 Ga. 903, 655 S.E.2d 586 (2008).

**Cited in** *Davis & Brandon v. Elliott*, 163 Ga. 169, 135 S.E. 731 (1926); *Wiley v. Martin*, 163 Ga. 381, 136 S.E. 151 (1926); *Bibb County v. Elkan*, 184 Ga. 520, 192 S.E. 7 (1937); *Caldwell v. Northwest Atlanta Bank*, 194 Ga. 370, 21 S.E.2d 619 (1942); *Riviera Equip., Inc. v. Omega Equip. Corp.*, 147 Ga. App. 412, 249 S.E.2d 133 (1978).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 47 Am. Jur. 2d, Judicial Sales, § 218 et seq.

**C.J.S.** — 50A C.J.S., Judicial Sales, § 113 et seq.

**ALR.** — Grounds of collateral attack on judicial and execution sales, 1 ALR 1431.

Effect of reversal or vacation of judgment on execution sale, 29 ALR 1071.

Remedy for fraud preventing redemption from judicial sale, 44 ALR 690.

Rights and remedies of purchaser at judicial or execution sale, where sale is void or is set aside because proceedings

are imperfect or irregular, or where description of property is defective, 142 ALR 310.

Rights and remedies of one purchasing at judicial or execution sale where there was misrepresentation or mistake as to acreage or location of boundaries of tract sold, 69 ALR2d 254.

Right of purchaser at execution sale, upon failure of title, to reimbursement or restitution from judgment creditor, 33 ALR4th 1206.

### 9-13-172.1. “Eligible sale” defined; rescision of sale; damages.

(a) As used in this Code section, “eligible sale” means a judicial or nonjudicial sale that was conducted in the usual manner of a sheriff's sale and that was rescinded by the seller within 30 days after the sale but before the deed or deed under power has been delivered to the purchaser.

(b) Upon rescision of an eligible sale, the seller shall return to the purchaser, within five days of the rescision, all bid funds paid by the purchaser.

(c) Where the eligible sale was rescinded due to an automatic stay pursuant to the filing of bankruptcy by a person with an interest in the property, the damages that may be awarded to the purchaser in any civil action shall be limited to the amount of the bid funds tendered at the sale.

(d) Where the eligible sale was rescinded due to:

- (1) The statutory requirements for the sale not being fulfilled;
- (2) The default leading to the sale being cured prior to the sale; or
- (3) The plaintiff in execution and the defendant in execution having agreed prior to the sale to cancel the sale based upon an enforceable promise by the defendant to cure the default,



the damages that may be awarded to the purchaser in any civil action shall be limited solely to the amount of the bid funds tendered at the sale plus interest on the funds at the rate of 18 percent annually, calculated daily. Notwithstanding any other provision of law, specific performance shall not be a remedy available under this Code section. (Code 1981, § 9-13-172.1, enacted by Ga. L. 2003, p. 413, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2003, “usual” was substituted for “ususal” in subsection (a).

**Law reviews.** — For survey article on

real property law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 397 (2003). For annual survey on real property, see 64 Mercer L. Rev. 255 (2012).

### JUDICIAL DECISIONS

**Legislative intent.** — Legislature intended with O.C.G.A. § 9-13-172.1 to create a mechanism to give homeowners every opportunity to cure a default and avoid the harmful and disturbing effects of foreclosure because there is an unquestionable impact by the statute on homeowners of property in foreclosure who, prior to sale, cure the default or enter into agreements to cure the default. *JIG Real Estate, LLC v. Countrywide Home Loans, Inc.*, 289 Ga. 488, 712 S.E.2d 820 (2011).

**Statute not unconstitutionally vague.** — Trial court did not err by upholding the constitutionality of O.C.G.A. § 9-13-172.1 because the purchaser completely failed to carry the purchaser’s burden of showing that § 9-13-172.1 was unconstitutionally vague in any of the statute’s applications; persons of common intelligence would have no difficulty understanding that § 9-13-172.1 in and of itself authorizes rescission of an eligible sale due to the occurrence of the bankruptcy stay in § 9-13-172.1(c) or one of the

three situations set forth in § 9-13-172.1(d). *JIG Real Estate, LLC v. Countrywide Home Loans, Inc.*, 289 Ga. 488, 712 S.E.2d 820 (2011).

**Statute authorized rescission of eligible sale.** — Trial court did not err by finding that the holder of the deed to secure debt on mortgagors’ property was authorized to and properly did rescind a foreclosure sale to a purchaser because O.C.G.A. § 9-13-172.1 authorized under clearly defined circumstances the rescission of an eligible sale. *JIG Real Estate, LLC v. Countrywide Home Loans, Inc.*, 289 Ga. 488, 712 S.E.2d 820 (2011).

**Application.** — Rescission provisions of O.C.G.A. § 9-13-172.1, by their terms, allow a foreclosing lender to rescind a foreclosure sale and the memorandum of sale simply memorializes certain aspects of the foreclosure sale, thus, rescinding the foreclosure sale also rescinds the memorandum of sale. *Stowers v. Branch Banking & Trust Co.*, 317 Ga. App. 893, 731 S.E.2d 367 (2012).

### 9-13-173. Effect of judicial sale on title.

A sale regularly made by virtue of judicial process issuing from a court of competent jurisdiction shall convey the title as effectually as if the sale were made by the person against whom the process was issued. (Orig. Code 1863, § 2575; Code 1868, § 2577; Code 1873, § 2619; Code 1882, § 2619; Civil Code 1895, § 5446; Civil Code 1910, § 6051; Code 1933, § 39-1303.)



## JUDICIAL DECISIONS

**This section states cardinal rule that purchaser at judicial sale acquires title** and interest of the defendant in execution. *Andrews v. Murphy*, 12 Ga. 431 (1853); *Roberts v. Boylon*, 24 Ga. 40 (1858).

**Rule of this section applies to sale of property by federal revenue officer.** *Walters v. Taylor*, 19 Ga. App. 822, 92 S.E. 352 (1917).

**Purchaser under void judgment may acquire title by adverse possession.** *Gitten's Lessee v. Lowry*, 15 Ga. 336 (1854); *Rogers v. Smith*, 146 Ga. 373, 91 S.E. 414 (1917).

**Sale regularly made by virtue of proper judicial process** issuing from court of competent jurisdiction conveys title as effectually as if the sale were made by the person against whom the process issues; and the purchaser at such sale is ordinarily entitled to immediate possession, which the purchaser may obtain by writ of possession; but this is not the purchaser's exclusive remedy. *Hill v. Kitchens*, 39 Ga. App. 789, 148 S.E. 754 (1929); *Hunter v. Ranitz*, 88 Ga. App. 182, 76 S.E.2d 542 (1953).

**Judicial sale of property does not divest it of lien for taxes.** *Harris Orchard Co. v. Tharpe*, 177 Ga. 547, 170 S.E. 811 (1933).

**Purchaser at judicial sale takes property subject to homestead** set apart by prior judgment of the ordinary (now probate judge). *Cook v. Hendricks*, 146 Ga. 63, 90 S.E. 383 (1916).

**Purchaser at judicial sale is subject to lease.** *Field v. Howell*, 6 Ga. 423 (1849).

**Purchaser at judicial sale is subject to other claims after garnishee sold**

**property to bona fide purchaser** prior to judgment. *McCranie v. Gaskins*, 146 Ga. 802, 92 S.E. 533 (1917).

**Unrecorded rights of vendor, under retention of title contract, will not be protected.** *Pickard & Hogg v. Garrett*, 141 Ga. 831, 82 S.E. 251 (1914).

**Errors by sheriff in sale of property.** — If the sheriff has authority to sell property, a failure in the performance of any part of the sheriff's duty, and for which the sheriff would be compelled to indemnify the owner to the extent of the injury received, would not destroy the title of an innocent purchaser. *Ryals v. Lindsay*, 176 Ga. 7, 167 S.E. 284 (1932).

**Sale of property when security deed foreclosed as equitable mortgage.** — When a security deed was foreclosed as an equitable mortgage, and the equity of redemption forever barred, and the land was sold under order of the court by a commissioner, and the sale was approved by the court, the approval of the sale was a confirmation of all previous steps in the proceeding, and the purchaser at such sale received as full title as was held by the holder of the security deed. *Ryals v. Lindsay*, 176 Ga. 7, 167 S.E. 284 (1932).

**Cited in** *Holt v. Laurens*, 193 Ga. 136, 17 S.E.2d 571 (1941); *J.R. Watkins Co. v. Farmers Fertilizer Co.*, 195 Ga. 455, 24 S.E.2d 660 (1943); *Townsend v. Tattnall Bank*, 76 Ga. App. 500, 46 S.E.2d 607 (1948); *McGinley v. Goette*, 205 Ga. 225, 52 S.E.2d 848 (1949); *Tow v. Forrester*, 122 Ga. App. 718, 178 S.E.2d 692 (1970); *Gilbert v. Reynolds*, 233 Ga. 488, 212 S.E.2d 332 (1975).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 47 Am. Jur. 2d, Judicial Sales, § 146 et seq.

**C.J.S.** — 50A C.J.S., Judicial Sales, §§ 87, 88.

**ALR.** — Effect of destruction of or damage to property after judicial or execution sale on rights and liability of successful bidder, 17 ALR 970; 25 ALR 71.

Violation of direction of decree or order

as regards sale of land in parcels or in gross as affecting validity of sale and title of purchaser, 84 ALR 324.

Sheriff's deed as making a prima facie case for one seeking to recover land thereunder, 108 ALR 667.

Right of purchaser at execution or judicial sale to value of personal use and occupation by judgment debtor or his suc-



cessor in interest during period of redemption, 153 ALR 739.

Reversal, upon writ of error or appeal, of decree directing judicial sale as affecting title of stranger to litigation who purchased at such sale before appeal or pending appeal without supersedeas, 155 ALR 1252.

Purchase of cotenant's interest at judicial sale as making purchaser cotenant, 159 ALR 395.

Right of purchaser at judicial or execution sale made subject to a purported lien to question validity thereof, 171 ALR 302.

**9-13-174. When sheriff's successor empowered to make titles.**

If a sheriff fails to make titles to a purchaser, his successor in office may make them in the same manner as if he had sold the property. (Laws 1799, Cobb's 1851 Digest, p. 576; Code 1863, § 2583; Code 1868, § 2585; Code 1873, § 2627; Code 1882, § 2627; Civil Code 1895, § 5453; Civil Code 1910, § 6058; Code 1933, § 39-1304.)

**JUDICIAL DECISIONS**

**This section is mandatory in its term,** and an order of the court to make a title to land is unnecessary. Fretwell v. Doe, 7 Ga. 264 (1849); Clements v. Lyon ex rel. Moyas, 51 Ga. 126 (1874).

**RESEARCH REFERENCES**

**C.J.S.** — 50A C.J.S., Judicial Sales, §§ 12-24.

**ALR.** — Validity of sale by sheriff or similar public officer as affected by previous removal, resignation, or expiration of term, 10 ALR 1341.

**9-13-175. Duty of officer to place purchaser in possession; which persons officer may dispossess.**

When any sheriff or other officer sells any real estate or present interest in land by virtue of and under any execution or otherwise, it shall be his duty, upon application, to place the purchaser or his agent or attorney in possession of the real estate. To this end, the officer may dispossess the defendant, his heirs, his tenants, or his lessees, vendees, or assignees since the judgment. However, he may not dispossess other persons claiming under an independent title. (Laws 1811, Cobb's 1851 Digest, p. 510; Laws 1823, Cobb's 1851 Digest, p. 512; Code 1863, §§ 2580, 3578; Code 1868, §§ 2582, 3601; Code 1873, §§ 2624, 3651; Code 1882, §§ 2624, 3651; Civil Code 1895, §§ 5451, 5468; Civil Code 1910, §§ 6056, 6073; Code 1933, §§ 39-1309, 39-1312.)

**JUDICIAL DECISIONS**

**Legislative intent.** — It was the intention of the General Assembly to provide that the general rule should be that, in all cases when a present interest in real estate was sold by a judicial officer, under any execution, the purchaser at such sale should be entitled to be placed in possession by the officer making the sale in a



summary way, and thereby be saved the delay and annoyance incident to acquiring possession by an ordinary suit at law founded upon the title acquired by the officer at the sale. It is incumbent upon anyone who is attacking the right of the sheriff to dispossess the sheriff to show that the person comes within an exception. *Alexander v. Holmes*, 180 Ga. 397, 179 S.E. 77 (1935).

**This section does not authorize writ of possession** against holder of independent title. *Bigelow v. Smith*, 23 Ga. 318 (1857); *Seymour v. Morgan*, 45 Ga. 201 (1872); *Strickland v. Griffin*, 70 Ga. 541 (1883); *Lang v. Yearwood*, 127 Ga. 155, 56 S.E. 305 (1906).

**To whom possession intended to be given.** — Under this section, possession is intended to be given, only as against defendant in execution, and those holding under the defendant. *Voyles v. Federal Land Bank*, 182 Ga. 569, 186 S.E. 405 (1936).

**By "judicial officer," in this section, is meant** an agent or officer of the court in making a sale under judicial orders or process so that a receiver making a sale under order of the court is in that sense a judicial officer, though the receiver's duties are ministerial; and it is the receiver's duty to put the purchaser in possession of the property so sold. *Alexander v. Holmes*, 180 Ga. 397, 179 S.E. 77 (1935).

**Purchaser at judicial sale is ordinarily entitled to immediate possession;** such right of possession in the purchaser would imply a correlative duty on the part of the defendant in *fi. fa.* to vacate the premises promptly on notice of the sale or on demand by the purchaser. *Hunter v. Ranitz*, 88 Ga. App. 182, 76 S.E.2d 542 (1953).

**When applicant has made out prima facie case,** the applicant is entitled to a writ of possession. *Voyles v. Federal Land Bank*, 182 Ga. 569, 186 S.E. 405 (1936).

**Person claiming to be within exception to sheriff's right to dispossess** under this section must make a showing to the court and it is for the court to decide whether or not such a showing makes the claimant exempt from summary dispos-

session. *Voyles v. Federal Land Bank*, 182 Ga. 569, 186 S.E. 405 (1936).

**Court has authority to make claimant party to petition seeking possession** in order to settle the rights of all parties in one action, without remitting the petitioner to a common-law action of ejectment. *Voyles v. Federal Land Bank*, 182 Ga. 569, 186 S.E. 405 (1936).

**Federal marshal has only powers of sheriff in matters under this section.** *Paramore v. Persons*, 57 Ga. 473 (1876).

**Defendant in *fi. fa.* is entitled to possession when** only estate in remainder was sold. *Bledsoe v. Willingham*, 62 Ga. 550 (1879).

**Summary dispossession of lessee from grantor in security deed.** — Lessee from grantor in security deed, duly filed and recorded, can be summarily dispossessed by the sheriff for the purpose of placing in possession a purchaser of the property at a sale had under a judgment setting up a special lien upon the same, rendered in an action by the creditor on the debt secured by such deed. *Voyles v. Federal Land Bank*, 182 Ga. 569, 186 S.E. 405 (1936).

**Title resulting from tax sale would constitute sufficient ground for court's refusing application from the holder of a security deed** who, after obtaining judgment upon notes secured thereby and becoming the purchaser of the property at an execution sale made in pursuance of such judgment, applied to the superior court for an order to require the sheriff to place the applicant in possession of the property, when it appeared from the evidence that the execution of writ of possession as applied for would require the officer to dispossess another person who held the property under a valid independent title. *Edwards v. Hall*, 176 Ga. 632, 168 S.E. 254 (1933).

**Cited in** *Raisin v. Statham*, 22 F. 144 (S.D. Ga. 1884); *Suttles v. Sewell*, 105 Ga. 129, 31 S.E. 41 (1898); *Hines v. Lavant*, 158 Ga. 336, 123 S.E. 611 (1924); *Zugar v. Scarbrough*, 186 Ga. 310, 197 S.E. 854 (1938); *Interstate Bond Co. v. Cullars*, 189 Ga. 283, 5 S.E.2d 756 (1939); *Home Fed. Sav. & Loan Ass'n v. Cobb*, 236 Ga. 684, 225 S.E.2d 51 (1976).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 47 Am. Jur. 2d, Judicial Sales, §§ 110, 111.

**C.J.S.** — 50A C.J.S., Judicial Sales, § 106, 107 et seq.

### 9-13-176. How possession obtained after expiration of court term or replacement of officer.

If the purchaser of real estate at sheriff's and other sales under execution fails to make application for possession thereof until the next term of the superior court after the sale has taken place or until the officer making the sale has gone out of office, the possession may be obtained only under an order of the superior court. (Orig. Code 1863, § 3579; Code 1868, § 3602; Code 1873, § 3652; Code 1882, § 3652; Civil Code 1895, § 5469; Civil Code 1910, § 6074; Code 1933, § 39-1313.)

## JUDICIAL DECISIONS

**Former Civil Code 1895, § 5469** (see now O.C.G.A. § 9-13-176) has been construed with former Civil Code 1895, §§ 5451 and 5468 (see now O.C.G.A. § 9-13-175). *Mattlage v. Mulherin*, 106 Ga. 834, 32 S.E. 940 (1899).

**Purchaser may waive the right to possession** by a contract with the defendant in executions. *Chambers v. Collier*, 4 Ga. 193 (1848).

**Pendency of suit respecting sale will not postpone right to order.** *Williamson v. White*, 101 Ga. 276, 28 S.E. 846 (1897); *Suttles v. Sewell*, 105 Ga. 129, 31 S.E. 41 (1898).

**Injunction will lie to prevent defendant in fieri facias from cutting timber**, although purchaser failed to apply for possession. *Hines v. Lavant*, 158 Ga. 336, 123 S.E. 611 (1924).

**Title resulting from tax sale would**

**constitute sufficient ground for court's refusing application** under this section when the holder of a security deed, after obtaining judgment upon notes secured thereby and becoming the purchaser of the property at an execution sale made in pursuance of such judgment, applied to the superior court for an order to require the sheriff to place the applicant in possession of the property since it appeared from the evidence that the execution of writ of possession as applied for would require the officer to dispossess another person who held the property under a valid independent title. *Edwards v. Hall*, 176 Ga. 632, 168 S.E. 254 (1933).

**Cited in** *Alexander v. Holmes*, 180 Ga. 397, 179 S.E. 77 (1935); *Voyles v. Federal Land Bank*, 182 Ga. 569, 186 S.E. 405 (1936); *Interstate Bond Co. v. Cullars*, 189 Ga. 283, 5 S.E.2d 756 (1939).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 47 Am. Jur. 2d, Judicial Sales, §§ 110, 111.

**C.J.S.** — 50A C.J.S., Judicial Sales, § 106 et seq.

### 9-13-177. Right to enforce covenants.

The purchaser at a judicial sale may enforce any covenants of warranty running with the land which are incorporated in the previous title deeds. (Orig. Code 1863, § 2578; Code 1868, § 2581; Code 1873,



§ 2623; Code 1882, § 2623; Civil Code 1895, § 5450; Civil Code 1910, § 6055; Code 1933, § 39-1308.)

**Cross references.** — Rights to which purchaser at public or private sale succeeds generally, § 44-5-60.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 47 Am. Jur. 2d, Judicial Sales, § 153.

**C.J.S.** — 50A C.J.S., Judicial Sales, § 106 et seq.

**ALR.** — Waiver of right to enforce re-

strictive covenant by failure to object to other violations, 25 ALR5th 123.

Change in character of neighborhood as affecting validity or enforceability of restrictive covenant, 76 ALR5th 337.

### 9-13-178. When title deeds prior to purchase must be proved.

In all controversies in the courts of this state, the purchaser at a judicial sale shall not be required to show title deeds prior to his purchase unless it is necessary for his case to show good title in the person whose interest he purchased. (Orig. Code 1863, § 2576; Code 1868, § 2578; Code 1873, § 2620; Code 1882, § 2620; Civil Code 1895, § 5447; Civil Code 1910, § 6052; Code 1933, § 39-1305.)

**History of Code section.** — The language of this Code section is derived in

part from the decision in *Whatley v. Doe*, 10 Ga. 74 (1851).

### JUDICIAL DECISIONS

**Purchaser cannot demand that original owner give the purchaser certain deeds** constituting chain of title. *Gay v. Warren*, 115 Ga. 733, 42 S.E. 86, 90 Am. St. R. 151 (1902).

**Sheriff's deed must be supported by proof of defendant in execution's title** to maintain trespass action. *Parker v. Martin*, 68 Ga. 453 (1882); *Wood v. Haines*, 72 Ga. 189 (1883); *Ault v. Meager*, 112 Ga. 148, 37 S.E. 185 (1900).

**Requirements to maintain action for ejectment.** — When neither the petition in an action for ejectment nor the abstract attached thereto and made a part

thereof shows title in the plaintiffs, purchasers of land obtained from an execution sale, to the lands in dispute, from the original source or from a common grantor, and fails to show either title in or possession by a defendant in execution in the sheriff's deed at the time of the levy, the petition fails to set out a cause of action. *McGinley v. Goette*, 205 Ga. 225, 52 S.E.2d 848 (1949).

**Cited in** *Walton v. Sikes*, 165 Ga. 422, 141 S.E. 188 (1927); *Sinclair v. Friedlander*, 197 Ga. 797, 30 S.E.2d 398 (1944).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 47 Am. Jur. 2d, Judicial Sales, § 146 et seq.

**C.J.S.** — 50A C.J.S., Judicial Sales, §§ 87, 88.

**ALR.** — Sheriff's deed as making a prima facie case for one seeking to recover land thereunder, 36 ALR 986; 108 ALR 667.



CHAPTER 14

HABEAS CORPUS

Article 1  
General Provisions

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- 9-14-2. Habeas corpus on account of detention of spouse or child.
- 9-14-3. Petition for writ — Contents.
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- 9-14-5. When writ granted.
- 9-14-6. Form of writ.
- 9-14-7. Return day for writ.
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- 9-14-11. Respondent's return to writ — Verification; production of person detained.
- 9-14-12. Respondent's return to writ — Statement of transfer of custody; procedure when transfer made to avoid writ.
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- 9-14-14. Hearing of issue.
- 9-14-15. To whom notice of hearing given.
- 9-14-16. When person not to be discharged.
- 9-14-17. Discharge for defect in affidavit, warrant, or commitment.
- 9-14-18. Discharge after arrest for offense committed in another state.
- 9-14-19. Powers of court in cases not covered by Code Sections 9-14-16 through 9-14-18.
- 9-14-20. Recordation of proceedings by clerk of court; fees.

- Sec.
- 9-14-21. Costs of proceedings.
- 9-14-22. Appeals; speedy hearing; transmittal of remittitur.
- 9-14-23. Attachment for contempt for disobedience of writ.

Article 2  
Procedure for Persons under Sentence of State Court of Record

- 9-14-40. Legislative intent.
- 9-14-41. Article as exclusive procedure.
- 9-14-42. Grounds for writ; waiver of objection to jury composition.
- 9-14-43. Jurisdiction and venue.
- 9-14-44. Petition — Contents and verification.
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- 9-14-47. Time for answer and hearing.
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- 9-14-48. Hearing; evidence; depositions; affidavits; determination of compliance with procedural rules; disposition.
- 9-14-49. Findings of fact and conclusions of law.
- 9-14-50. Transcription of proceedings.
- 9-14-51. Effect of failure to raise grounds for relief in original or amended petition.
- 9-14-52. Appeal procedure; application to Supreme Court by petitioner for certificate of probable cause; effect of appeal by respondent.
- 9-14-53. Reimbursement to counties for habeas corpus costs.

**Cross references.** — Prohibition against suspension of writ of habeas corpus, Ga. Const. 1983, Art. I, Sec. I, Para. XV. Provision that defendant shall not be discharged on writ of habeas corpus be-

cause of informality in commitment or in proceedings prior thereto, § 17-7-34. Right to apply for writ of habeas corpus to test legality of arrest made pursuant to extradition proceedings, § 17-13-30. Pay-



ment of fees from prisoner's inmate account upon filing of habeas corpus petition, § 42-12-7.1.

**Law reviews.** — For article on habeas

corpus, see 41 Emory L.J. 515 (1992). For article, "The Writ of Habeas Corpus in Georgia," see 12 Ga. St. B.J. 20 (2007).

## JUDICIAL DECISIONS

**Law provides for two different kinds of habeas corpus:** (1) by a person restrained or by someone in the person's behalf, in which case the only parties before the court are the person detained and the person detaining, and the only issue is the legality of such restraint, either under pretext of legal process or under no process or right of restraint; and (2) by one claiming right of custody against another holding custody, seeking not to release but to claim custody of the person detained, which covers not only cases involving detention of a wife or child but also what has been termed "habeas corpus ad prosequendum," which issues when necessary to remove a prisoner to another jurisdiction having the right to try the prisoner under a previous indictment or to imprison the prisoner under a previous sentence. *Faughnan v. Ross*, 197 Ga. 21, 28 S.E.2d 119 (1943).

**No habeas corpus relitigation of issues decided on appeal.** — Absent change in facts or law, issues decided on appeal cannot be relitigated in habeas

corpus proceedings. *Gibson v. Ricketts*, 244 Ga. 482, 260 S.E.2d 877 (1979), cert. denied, 445 U.S. 920, 100 S. Ct. 1285, 63 L. Ed. 2d 606 (1980).

**Cited** in *Harris v. Whittle*, 190 Ga. 850, 10 S.E.2d 926 (1940); *Great Am. Indem. Co. v. Beverly*, 150 F. Supp. 134 (M.D. Ga. 1956); *Cooper v. Stephens*, 214 Ga. 825, 108 S.E.2d 274 (1959); *West v. Hatcher*, 219 Ga. 540, 134 S.E.2d 603 (1964); *Clarke v. Grimes*, 374 F.2d 550 (5th Cir. 1967); *Mobley v. Dutton*, 380 F.2d 14 (5th Cir. 1967); *Kerry v. Brown*, 224 Ga. 200, 160 S.E.2d 832 (1968); *Strauss v. Stynchcombe*, 224 Ga. 859, 165 S.E.2d 302 (1968); *Moore v. Dutton*, 396 F.2d 782 (5th Cir. 1968); *Crosby v. Smith*, 404 F.2d 876 (5th Cir. 1968); *Reid v. State*, 119 Ga. App. 368, 166 S.E.2d 900 (1969); *Beasley v. Lamb*, 227 Ga. 266, 180 S.E.2d 240 (1971); *Harris v. Hopper*, 236 Ga. 389, 224 S.E.2d 1 (1976); *Bryant v. Wigley*, 246 Ga. 155, 269 S.E.2d 418 (1980); *Brand v. State*, 154 Ga. App. 781, 270 S.E.2d 206 (1980); *Earp v. Boylan*, 260 Ga. 112, 390 S.E.2d 577 (1990).

## RESEARCH REFERENCES

**Am. Jur. Proof of Facts.** — Pleading and Proving Ineffective Assistance of Counsel in a Federal Habeas Corpus Proceeding: A Primer, 88 POF3d 1.

**Am. Jur. Trials.** — Federal Habeas Corpus Practice, 20 Am. Jur. Trials 1.

Historical Aspects and Procedural Limitations of Habeas Corpus, 39 Am. Jur. Trials 157.

Habeas Corpus: Pretrial Rulings, 41 Am. Jur. Trials 349.

## ARTICLE 1

### GENERAL PROVISIONS

**Law reviews.** — For article, "Interstate Extradition and State Sovereignty," see 1 Mercer L. Rev. 147 (1950). For article advocating consistency in statutory provisions governing review of administrative conduct in this state, see 15 Ga. B.J. 153 (1952). For article discussing Georgia's

habeas corpus statutes in light of federal courts' requirements of exhaustion of state remedies prior to entertaining a habeas petition, see 9 Ga. St. B.J. 29 (1972). For article, "Georgia's Constitutional Scheme for State Appellate Jurisdiction," see 6 Ga. St. B.J. 24 (2001).



For note, "Interstate Extradition," see 1 J. Pub. L. 463 (1952).

### JUDICIAL DECISIONS

**Editor's notes.** — Article 2 of this chapter now provides the exclusive procedure for seeking a writ of habeas corpus for persons whose liberty is being restrained by virtue of sentence of a state court of record, expanding the scope of habeas in such cases. See O.C.G.A. §§ 9-14-40 and 9-14-41.

**Common-law nature of habeas corpus.** — Habeas corpus is a common-law remedy, not a statutory or equitable remedy. *Duke v. Duke*, 181 Ga. 21, 181 S.E. 161 (1935).

**Habeas corpus is a civil proceeding** under the laws of this state. *Ward v. Smith*, 228 Ga. 137, 184 S.E.2d 592 (1971).

**Habeas corpus proceeding is not a criminal prosecution.** *Nolley v. Caldwell*, 229 Ga. 441, 192 S.E.2d 151 (1972).

**Not technically a suit.** — In a habeas corpus proceeding, there is no plaintiff and no defendant, and there is no suit in the technical sense. *Delinski v. Dunn*, 209 Ga. 402, 73 S.E.2d 171 (1952).

**Illegal detention or restraint is the gist of a habeas corpus proceeding.** *Wilbanks v. Wilbanks*, 220 Ga. 665, 141 S.E.2d 161 (1965).

**Question to be determined on return of writ of habeas corpus** is legality of detention at the time of the hearing. *Harris v. Norris*, 188 Ga. 610, 4 S.E.2d 840 (1939); *Paulk v. Sexton*, 203 Ga. 82, 45 S.E.2d 768 (1947); *Balkcom v. Craton*, 220 Ga. 216, 138 S.E.2d 163 (1964).

**Habeas corpus is available to test legality of present confinement only.** *Sorrow v. Vickery*, 228 Ga. 191, 184 S.E.2d 462 (1971).

**Present confinement.** — Writ of habeas corpus looks only to the lawfulness of present confinement. *Balkcom v. Hurst*, 220 Ga. 405, 139 S.E.2d 306 (1964).

**Cannot test legality of future imprisonment.** — Habeas corpus proceedings cannot be used to test legality of possible future imprisonment. *Stynchcombe v. Hardy*, 228 Ga. 130, 184 S.E.2d 356 (1971).

**Habeas court cannot direct trial date.** — It is beyond the authority of the habeas court to direct that the defendant be retried by the trial court within a certain period of time. *State v. Hernandez-Cuevas*, 202 Ga. App. 861, 415 S.E.2d 713 (1992).

**Trial judge in habeas proceeding lacks authority to bar future prosecution** of applicant. *Stynchcombe v. Hardy*, 228 Ga. 130, 184 S.E.2d 356 (1971).

**Guilt or innocence of accused is not open to inquiry** by courts of this state in habeas corpus proceedings. *Hart v. Mount*, 196 Ga. 452, 26 S.E.2d 453 (1943).

It is not the function of the writ of habeas corpus to determine guilt or innocence of one accused of crime. *Paulk v. Sexton*, 203 Ga. 82, 45 S.E.2d 768 (1947).

**Appointment of counsel.** — Application for writ of habeas corpus is not a criminal proceeding, and neither U.S. Const., amend. 6 nor Ga. Const. 1983, Art. I, Sec. I, Para. XI requires appointment of counsel for petitioner. *Wyatt v. Caldwell*, 229 Ga. 597, 193 S.E.2d 607 (1972); *Wallace v. Ault*, 229 Ga. 717, 194 S.E.2d 88 (1972).

Habeas corpus is not a criminal proceeding and there is not a constitutional requirement for appointment of counsel in such cases. *McClure v. Hopper*, 234 Ga. 45, 214 S.E.2d 503 (1975); *Moye v. Hopper*, 234 Ga. 230, 214 S.E.2d 920 (1975); *Stephens v. Balkcom*, 245 Ga. 492, 265 S.E.2d 596 (1980).

There is no federal or state constitutional right to appointment of counsel in a habeas corpus proceeding. *Stephens v. Balkcom*, 245 Ga. 492, 265 S.E.2d 596 (1980).

Indigent habeas petitioners are not entitled to appointed counsel. *State v. Davis*, 246 Ga. 200, 269 S.E.2d 461 (1980), cert. denied, 449 U.S. 1057, 101 S. Ct. 631, 66 L. Ed. 2d 511 (1980).

Meaningful access to the courts does not require providing funds or appointing counsel to indigent habeas petitioners. *State v. Davis*, 246 Ga. 200, 269 S.E.2d



461 (1980), cert. denied, 449 U.S. 1057, 101 S. Ct. 631, 66 L. Ed. 2d 511 (1980).

**State is not required to pay petitioner's expenses** in habeas corpus proceedings. *State v. Davis*, 246 Ga. 200, 269 S.E.2d 461 (1980), cert. denied, 449 U.S. 1057, 101 S. Ct. 631, 66 L. Ed. 2d 511 (1980).

**Law does not require court to subpoena witnesses** at request of petitioner for habeas corpus. *Nolley v. Caldwell*, 229 Ga. 441, 192 S.E.2d 151 (1972).

**Judgments in habeas corpus cases are final judgments.** *Camp v. Camp*, 213 Ga. 65, 97 S.E.2d 125 (1957).

**Res judicata applies to habeas corpus proceedings.** *Balkcom v. Townsend*, 219 Ga. 708, 135 S.E.2d 399, cert. denied, 377 U.S. 1009, 84 S. Ct. 1939, 12 L. Ed. 2d 1055 (1964).

Order or judgment discharging a person in habeas corpus proceedings is conclusive in the person's favor that the person is illegally held in custody and is res judicata of all issues of law and fact necessarily involved in that result. *Sanders v. McHan*, 206 Ga. 155, 56 S.E.2d 281 (1949).

**Application to habeas corpus proceedings.** — In this state, the common-law rule that the doctrine of res judicata did not extend to the trial of habeas corpus proceedings was not of force and such proceedings were subject to former Code 1933, § 110-501 (see now O.C.G.A. § 9-12-40). *Mitchem v. Balkcom*, 219 Ga. 47, 131 S.E.2d 562 (1963).

**Habeas granted in extradition pro-**

**ceeding for technical objections.** — While grant of writ of habeas corpus is generally to be given res judicata effect in a subsequent habeas proceeding based on the same issues of law and fact, when a previous writ of habeas corpus in an extradition proceeding was granted because of insufficiency of supporting documents or other technical defects which may be subsequently corrected, prior judgment granting the writ would not be res judicata in a subsequent extradition demand brought to avoid the technical objections fatal to the first proceeding. *Broughton v. Griffin*, 244 Ga. 365, 260 S.E.2d 75 (1979).

**Discharge under writ precludes reconfinement under same process.** — Discharge of a party under a writ of habeas corpus from the process under which the party is imprisoned discharges the party from further confinement under the process. *Sanders v. McHan*, 206 Ga. 155, 56 S.E.2d 281 (1949).

**Discharge for same cause or under same sentence.** — Person discharged in habeas corpus proceedings cannot lawfully be again arrested, imprisoned, restrained, or kept in custody for the same cause or under the same sentence. *Sanders v. McHan*, 206 Ga. 155, 56 S.E.2d 281 (1949).

**Cited** in *Jones v. Hicks*, 172 Ga. 907, 159 S.E. 233 (1931); *Ellis v. Grimes*, 198 Ga. 51, 30 S.E.2d 921 (1944); *Porch v. Cagle*, 199 F.2d 865 (5th Cir. 1952); *McGarrah v. Dutton*, 381 F.2d 161 (5th Cir. 1967); *Moore v. Dutton*, 432 F.2d 1281 (5th Cir. 1970); *Leonard v. Benjamin*, 253 Ga. 718, 324 S.E.2d 185 (1985).

## OPINIONS OF THE ATTORNEY GENERAL

**Habeas corpus lies in behalf of an accused who has been denied benefit of counsel.** 1954-56 Op. Att'y Gen. p. 134.

**It is not mandatory that counsel be**

**appointed to habeas corpus proceeding.** 1954-56 Op. Att'y Gen. p. 133.

**Res judicata applies to habeas corpus cases.** 1954-56 Op. Att'y Gen. p. 133.

## RESEARCH REFERENCES

**ALR.** — Habeas corpus to test constitutionality of ordinance under which petitioner is held, 32 ALR 1054.

Mistreatment of prisoner as contempt, 40 ALR 1278.

Right to prove absence from demanding



state or alibi on habeas corpus in extradition proceedings, 51 ALR 797; 61 ALR 715.

Supersedeas, stay, or bail, upon appeal in habeas corpus, 63 ALR 1460; 143 ALR 1354.

Determination in extradition proceedings, or on habeas corpus in such proceedings, whether a crime is charged, 81 ALR 552; 40 ALR2d 1151.

Liability of judge, court, administrative officer, or other custodian of person for whose release the writ is sought, in connection with habeas corpus proceedings, 84 ALR 807.

Habeas corpus on ground of unlawful treatment of prisoner lawfully in custody, 155 ALR 145.

Right to aid of counsel in application of hearing for habeas corpus, 162 ALR 922.

Former jeopardy as ground for habeas corpus, 8 ALR2d 285.

Discharge in habeas corpus proceedings as constituting favorable termination of criminal proceedings requisite to maintenance of malicious prosecution action, 30 ALR2d 1128.

Right of accused to have his witnesses free from handcuffs, manacles, shackles, or the like, 75 ALR2d 762.

Discharge on habeas corpus of one held in extradition proceedings as precluding subsequent extradition proceedings, 33 ALR3d 1443.

Modern status of rule relating to jurisdiction of state court to try criminal defendant brought within jurisdiction illegally or as result of fraud or mistake, 25 ALR4th 157.

When is a person in custody of governmental authorities for purpose of exercise of state remedy of habeas corpus — modern cases, 26 ALR4th 455.

Jurisdiction of federal court to try criminal defendant who alleges that he was brought within United States' jurisdiction illegally or as result of fraud or mistake, 28 ALR Fed 685.

### 9-14-1. Who may seek writ.

(a) Any person restrained of his liberty under any pretext whatsoever, except under sentence of a state court of record, may seek a writ of habeas corpus to inquire into the legality of the restraint.

(b) Any person alleging that another person in whom for any cause he is interested is kept illegally from the custody of the applicant may seek a writ of habeas corpus to inquire into the legality of the restraint.

(c) Any person restrained of his liberty as a result of a sentence imposed by any state court of record may seek a writ of habeas corpus to inquire into the legality of the restraint. (Cobb's 1851 Digest, pp. 1131-1134; Code 1863, § 3909; Code 1868, § 3933; Code 1873, § 4009; Code 1882, § 4009; Penal Code 1895, § 1210; Penal Code 1910, § 1291; Code 1933, § 50-101; Ga. L. 1967, p. 835, § 2.)

**Cross references.** — Procedure for seeking writ of habeas corpus by person whose liberty is being restrained by virtue of sentence imposed by state court of record, § 9-14-40 et seq.

**Law reviews.** — For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982).

For note, "Seen But Not Heard: An Argument for Granting Evidentiary Hearings to Weigh the Credibility of Recanted Testimony," see 46 Ga. L. Rev. 213 (2011).

For comment, "Has Habeas Corpus Been Suspended in Georgia? Representing Indigent Prisoners on Georgia's Death Row," see 17 Ga. St. U.L. Rev. 605 (2000).



## JUDICIAL DECISIONS

**Editor's notes.** — Article 2 of this chapter now provides the exclusive procedure for seeking a writ of habeas corpus for persons whose liberty is being restrained by virtue of sentence of a state court of record, expanding the scope of habeas in such cases. See O.C.G.A. §§ 9-14-40 and 9-14-41.

**Any person may petition for writ of habeas corpus in behalf of one imprisoned** as interest arising from humanity alone comes within both the letter and spirit of this section. *Broomhead v. Chisolm*, 47 Ga. 390 (1872).

When any person in whom applicant, for any cause, is interested is kept illegally from the applicant's custody, the applicant may sue out a writ of habeas corpus to inquire into the legality of such restraint. *Smith v. Scott*, 216 Ga. 506, 117 S.E.2d 528 (1960).

**Writ does not issue as matter of course.** — While writ of habeas corpus is a "writ of right," it does not issue as a matter of course, but only when the application therefor contains allegations which, if true, would authorize discharge of the person held in custody. *Simmons v. Georgia Iron & Coal Co.*, 117 Ga. 305, 43 S.E. 780, 61 L.R.A. 739 (1903).

**Large discretion is vested in trial judge in habeas corpus cases,** and Supreme Court will not interfere unless there is an abuse of discretion. *Walden v. Morris*, 16 Ga. App. 408, 85 S.E. 452 (1915).

**Denial of commitment hearing grounds for preindictment habeas.** — Although not ground for post-conviction habeas corpus due to mootness, denial of commitment hearing would be ground for preindictment habeas corpus. *McClure v. Hopper*, 234 Ga. 45, 214 S.E.2d 503 (1975).

**Mere irregularities in commitment hearing insufficient.** — Writ of habeas corpus cannot be employed to correct errors or irregularities in commitment hearing held by justice of the peace, committing the defendant to jail to await action of the grand jury, but the judgment committing defendant must be absolutely void. *Harris v. Norris*, 188 Ga. 610, 4 S.E.2d 840 (1939).

**Habeas as means to address setting or denial of bail.** — Remedy of habeas corpus is a proper means with which to address the trial judge's exercise of discretion in setting or denying bail. *Fields v. Tankersley*, 487 F. Supp. 1389 (S.D. Ga. 1980).

**Habeas corpus properly issued when individual was illegally imprisoned** with or without any form of law. *Cathing v. State*, 62 Ga. 243 (1879); *Southern Express Co. v. Lynch*, 65 Ga. 240 (1880).

**Habeas proper in case of confinement during probationary period.** — Prisoner's petition for a writ of habeas corpus was properly filed when, through no fault of the prisoner's own, the prisoner had been released during the confinement portion of the prisoner's sentence and was subsequently imprisoned, without a hearing, during what should have been the probationary period of the sentence. *Derrer v. Anthony*, 265 Ga. 892, 463 S.E.2d 690 (1995).

**Petitioner suffering adverse collateral consequences from conviction.** — Habeas corpus petition challenging the petitioner's habitual violator conviction alleged adverse collateral consequences to sustain the petitioner's claim because the state introduced that conviction as non-statutory evidence in the petitioner's death penalty trial. *Tharpe v. Head*, 272 Ga. 596, 533 S.E.2d 368 (2000).

**Rearrest for same offense after pardon.** — Writ of habeas was properly issued when an individual was pardoned by the Governor and afterwards rearrested for the same offense. *Dominick v. Bowdoin*, 44 Ga. 357 (1871).

**Habeas corpus not proper when another adequate remedy exists.** — When proceedings under which the petitioner is detained are still pending undisposed of, and the ordinary established procedure is still available to the petitioner, the orderly procedure by trial and appeal should not be interfered with by writ of habeas corpus as there is another adequate remedy. *Jackson v. Lowry*, 170 Ga. 755, 154 S.E. 228 (1930); *Kearse v. Paulk*, 264 Ga. 509, 448 S.E.2d 369 (1994).



**Exhaustion of statutory remedies for release from insanity commitment.** — If a person has been adjudged insane and committed to an institution, and thereafter seeks to be discharged upon the ground that the person's sanity has been restored, the person cannot invoke the writ of habeas corpus without showing that the person has exhausted such specific statutory remedies as are provided; however, the person might perhaps show some valid reason excusing failure to pursue a statutory remedy, even in a case where ordinarily the person should pursue the remedy. *Richardson v. Hall*, 199 Ga. 602, 34 S.E.2d 888 (1945).

When a person charged with a criminal offense filed a special plea of insanity under former Code 1933, § 27-1502 (see now O.C.G.A. § 17-7-130), and on such plea was found insane and committed, and after such commitment left the hospital without permission and was later taken into custody by a sheriff for return to such institution, the person could not maintain a habeas petition on the ground that the person had regained the person's sanity, without showing that the person had pursued or attempted to pursue the statutory method of obtaining release from the institution, or without alleging and proving some valid reason for failure to invoke such remedy. *Richardson v. Hall*, 199 Ga. 602, 34 S.E.2d 888 (1945).

**Quashing of petition which shows legality of detention on its face.** — When petition for habeas corpus clearly shows on the petition's face that the detention is lawful, there is nothing to investigate and the writ should be quashed. *Mathews v. Swatts*, 16 Ga. App. 208, 84 S.E. 980 (1915); *Smith v. Milton*, 149 Ga. 28, 98 S.E. 607 (1919).

**Completion of sentence not bar to writ.** — Mere fact that the state sentence has been completely served should no longer be a bar to attacking the sentence through habeas corpus even though the petition is not initially filed until after the sentence is completed. *Hardison v. Martin*, 254 Ga. 719, 334 S.E.2d 161 (1985).

**Release on own recognizance.** — Defendant who had been released on the defendant's own recognizance did not have sufficient restraint of liberty to war-

rant writ of habeas corpus to require district attorney to dismiss charges brought against the defendant. *Farris v. Slaton*, 262 Ga. 713, 425 S.E.2d 291 (1993).

**Habeas corpus proper remedy to obtain child from wrongful custody.** — When a natural mother brought a habeas corpus action under subsection (b) of O.C.G.A. § 9-14-1, alleging that her infant daughter was being detained illegally from her custody by the respondent and contending that there had never been a transfer of custody to respondent, the mother properly brought the complaint as a habeas corpus petition. *Johnson v. Smith*, 251 Ga. 1, 302 S.E.2d 542 (1983).

**Habeas corpus proper remedy for revocation of driver's license.** — Revocation of one's driver's license may place a significant restraint on that person's liberty within the meaning of subsection (c) of O.C.G.A. § 9-14-1; therefore, one not in physical custody may petition for habeas corpus to challenge the revocation of one's driver's license on the ground that the underlying sentence upon which the revocation is based is void for a reason not appearing on the face of the record. The petitioner must be able to demonstrate that the revocation significantly restrains the petitioner's liberty, or that other adverse collateral consequences flow from the petitioner's sentence of conviction. *Hardison v. Martin*, 254 Ga. 719, 334 S.E.2d 161 (1985) (But see now O.C.G.A. § 19-9-23).

Action for a writ of habeas corpus is appropriate to contest a revocation of a driver's license, but the appellate procedure available under O.C.G.A. § 40-5-66 must be followed. *Earp v. Lynch*, 257 Ga. 633, 362 S.E.2d 55 (1987).

**Application to ineffective assistance claim.** — Since the petitioner showed that the petitioner's appellate counsel provided ineffective assistance of counsel by not raising a chain of custody issue on appeal after the state was required to prove a chain of custody of a controlled substance at trial, the petitioner was entitled to have the petitioner's application for habeas corpus relief granted as any competent attorney would have raised that issue on appeal, the petitioner's appellate counsel was ineffective



in failing to do so, and the petitioner was prejudiced because the error, if raised, would have led to a different outcome on appeal. *Phillips v. Williams*, 276 Ga. 691, 583 S.E.2d 4 (2003).  
**Cited** in *Ballenger v. McLain*, 54 Ga. 159 (1875); *Moore v. Wheeler*, 109 Ga. 62, 35 S.E. 116 (1900); *Jackson v. Baxter*, 145 Ga. 223, 88 S.E. 819 (1916); *Parris v.*

*State*, 232 Ga. 687, 208 S.E.2d 493 (1974); *Jones v. Hopper*, 233 Ga. 531, 212 S.E.2d 367 (1975); *Vaughn v. State*, 248 Ga. 325, 283 S.E.2d 263 (1981); *Johnson v. Smith*, 164 Ga. App. 611, 299 S.E.2d 387 (1982); *Horton v. Wilkes*, 250 Ga. 902, 302 S.E.2d 94 (1983); *Zant v. Cook*, 259 Ga. 299, 379 S.E.2d 780 (1989); *Powell v. Brown*, 281 Ga. 609, 641 S.E.2d 519 (2007).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, §§ 99, 142, 143.  
**C.J.S.** — 39A C.J.S., Habeas Corpus, § 283.  
**ALR.** — Right of one detained pursuant

to quarantine to habeas corpus, 2 ALR 1542.  
Habeas corpus to test the sufficiency of indictment or information as regards the offense sought to be charged, 57 ALR 85.

9-14-2. Habeas corpus on account of detention of spouse or child.

In all writs of habeas corpus sought on account of the detention of a spouse or child, the court on hearing all the facts may exercise its discretion as to whom the custody of the spouse or child shall be given and shall have the power to give the custody of a child to a third person. (Laws 1845, Cobb’s 1851 Digest, p. 335; Code 1863, § 3925; Code 1868, § 3948; Code 1873, § 4024; Code 1882, § 4024; Civil Code 1895, § 2453; Penal Code 1895, § 1226; Civil Code 1910, § 2972; Penal Code 1910, § 1307; Code 1933, § 50-121; Ga. L. 1976, p. 1050, § 2.)

**Cross references.** — Child custody, generally, T. 19, C. 9, A. 1. Child Custody Intrastate Jurisdiction Act, T. 19, C. 9, A. 2. Uniform Child Custody Jurisdiction Act, T. 19, C. 9, A. 3. Prohibition against use of complaint in nature of habeas corpus to seek change of child custody, § 19-9-23.  
**Law reviews.** — For article, “Custody Disputes and the Proposed Model Act,” see 2 Ga. L. Rev. 162 (1968). For article criti-

cizing parental rights doctrine and advocating best interests of child doctrine in parent-third party custody disputes, see 27 Emory L.J. 209 (1978). For article surveying legislative and judicial developments in Georgia’s divorce, alimony, and child custody laws for 1978-79, see 31 Mercer L. Rev. 75 (1979).  
For comment on “Grandparents’ Visitation Rights in Georgia,” see 29 Emory L.J. 1083 (1980).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- DISCRETION OF COURT
- THIRD PERSONS
- PROCEDURAL MATTERS
- SPECIFIC APPLICATION



### General Consideration

**Editor's notes.** — Section 19-9-23 now provides that a complaint seeking to obtain a change in the legal custody of a child shall be brought as a separate action. Habeas corpus may not be used for this purpose, nor may such complaint be made as a counterclaim or otherwise in response to a habeas petition seeking to enforce a child custody order. Hence, decisions rendered prior to enactment of § 19-9-23 should be consulted with care.

**Superior court without jurisdiction when juvenile court order in effect.** — When a juvenile court order relating to disposition of a deprived child, entered pursuant to former Code 1933, § 24A-2301 (see now O.C.G.A. § 15-11-18) after notice and hearing, was still in effect, the superior court had no jurisdiction of the related habeas corpus petition. *West v. Cobb County Dep't of Family & Children Servs.*, 243 Ga. 425, 254 S.E.2d 373 (1979).

**Uses of habeas compared.** — There is a clear distinction between a writ to acquire freedom from a person who is illegally depriving one of one's liberty, and a writ to secure the custody of a child awarded in a divorce decree; in the former, the issue is lawful or unlawful imprisonment while in the latter no imprisonment or liberty is involved, but only the question of who shall have custody of the child. *McBurnett v. Warren*, 208 Ga. 225, 66 S.E.2d 49 (1951).

**In habeas corpus case involving custody of minor child,** writ of habeas corpus was appropriate process to bring defendant into court. *Tyree v. Jackson*, 226 Ga. 690, 177 S.E.2d 160 (1970).

In father's habeas action against divorced wife for daughter's custody, applicable law was former Code 1933, § 74-107 (see now O.C.G.A. § 19-9-3) rather than former Code 1933, § 50-121 (see now O.C.G.A. § 9-14-2). *Knox v. Knox*, 226 Ga. 619, 176 S.E.2d 712 (1970).

**Welfare of child paramount.** — In a habeas corpus proceeding for the possession of a minor, the paramount consideration is the welfare of the child. *Weathersby v. Jordan*, 124 Ga. 68, 52 S.E. 83 (1905); *Walker v. Jones*, 1 Ga. App. 70,

57 S.E. 903 (1907); *Evans v. Lane*, 8 Ga. App. 826, 70 S.E. 603 (1911).

Ordinarily, when habeas corpus is brought to determine the custody of a child, the court has broad discretion, and may award custody even to a stranger, the best interest of the child being the paramount consideration. *Crapps v. Smith*, 9 Ga. App. 400, 71 S.E. 501 (1911).

In all cases of habeas corpus to determine the custody of a child, the welfare of the child is the paramount consideration, and the court will look into all the circumstances and ascertain what is best for the interest and welfare of the child. *Yancey v. Watson*, 217 Ga. 215, 121 S.E.2d 772 (1961).

**Wishes of minor over 14 not controlling.** — In habeas corpus proceedings to determine who is entitled to custody of a minor over the age of 14, the wish of the minor, while entitled to due consideration, is not in all circumstances necessarily controlling. *Chunn v. Graham*, 117 Ga. 551, 43 S.E. 987 (1903); *Brown v. Harden*, 150 Ga. 99, 102 S.E. 864 (1920).

**Provision for child support.** — In an order in a habeas corpus action changing child custody from one party to the other, the court can provide therein that child support shall be payable to or by the person to whom custody is awarded. *Anglon v. Griffin*, 241 Ga. 546, 246 S.E.2d 666 (1978).

**Rights of third parties governed by section.** — Provision of former Code 1933, § 74-107 (see now O.C.G.A. § 19-9-3), providing that there was no prima facie right to custody of the child in the father, did not enlarge the rights of third parties, which were governed by former Code 1933, § 50-121 (see now O.C.G.A. § 9-14-2). *Knox v. Knox*, 226 Ga. 619, 176 S.E.2d 712 (1970).

**Habeas not available to one without legal right to custody.** — While former Code 1933, §§ 50-121 and 74-106 (see now O.C.G.A. §§ 9-14-2 and 19-9-2) authorized the habeas corpus court to exercise discretion as to possession of a minor child in the circumstances stated therein, no right was given by those statutes to a person claiming no legal right of custody to institute a habeas corpus proceeding. *Spitz v. Holland*, 243 Ga. 9, 252 S.E.2d 406 (1979).



**General Consideration (Cont'd)**

**Interest in humanity** — Habeas corpus is not an available remedy to inquire into the legality of custody of a child when the alleged detention is not against the right of the applicant for habeas corpus. *Bennett v. Schaffer*, 229 Ga. 59, 183 S.E.2d 760 (1971).

Interest arising from humanity is sufficient to entitle a person to bring a writ of habeas corpus in behalf of one imprisoned, but an interest in humanity is not sufficient to sustain the writ when the petitioner claims custody of the person against another holding custody; in such case, habeas will lie only when the detention is against the right of the applicant. *Hall v. Hall*, 222 Ga. 820, 152 S.E.2d 737 (1966).

**Grandparents held without standing to bring habeas.** — Maternal grandparents, praying for custody of grandchildren or, alternatively, visitation rights, had no standing to bring habeas corpus action against surviving parent, children's father. *Spitz v. Holland*, 243 Ga. 9, 252 S.E.2d 406 (1979).

**Petition seeking recognition of court-awarded visitation rights of custodial parent.** — When petition alleged that father was given visitation right in final divorce decree and that child was being illegally withheld from him by the mother, who absolutely refused to allow such visitations, the superior court did not err in overruling the defendant mother's general demurrer (now motion to dismiss) to the father's petition for a writ of habeas corpus. *Smith v. Scott*, 216 Ga. 506, 117 S.E.2d 528 (1960).

**Nonresident custodial parent bringing habeas against resident noncustodial parent.** — Suit in the nature of habeas corpus to change a decree of custody may not be brought against a custodial parent by a noncustodial parent in the county in which the noncustodial parent resides. *Matthews v. Matthews*, 238 Ga. 201, 232 S.E.2d 76 (1977).

When nonresident parent who has been awarded custody of a child by court order enters this state to regain that child from the noncustodial parent and files a habeas corpus petition, the trial court may not

reconsider the question of legal custody. *Bayard v. Willis*, 241 Ga. 459, 246 S.E.2d 315 (1978).

Despite a child's attaining the age of 14 and residing in this state with the noncustodial parent, the Georgia court is not authorized to relitigate the issue of legal custody; only a court where the custodial parent resides has the right to award a change in custody. *Bayard v. Willis*, 241 Ga. 459, 246 S.E.2d 315 (1978).

**Attack on foreign decree for lack of jurisdiction.** — On habeas corpus by a father to recover custody of his minor child living with the mother in this state, predicated upon a decree of a Michigan court dissolving his marriage and awarding the child to him, the full faith and credit clause of the federal Constitution did not preclude a court of this state from declaring the Michigan decree void for lack of jurisdiction of the child. *Elliott v. Elliott*, 181 Ga. 545, 182 S.E. 845 (1935).

**Jurisdiction of court not affected by child's location.** — In habeas corpus proceedings to recover custody of a child, mere fact that such child, at the time of the petition, is in a foreign jurisdiction will not deprive the court of jurisdiction, nor be sufficient excuse for not producing the child in obedience to the writ. *Crowell v. Crowell*, 190 Ga. 501, 9 S.E.2d 628 (1940).

**Awarding custody pending divorce when habeas proceeding is pending.** — In determining custody of children, upon a pending suit for divorce, alimony, and custody, judge of the superior court, despite pendency of a habeas corpus proceeding between the same parties, after hearing all the facts and circumstances may exercise sound discretion in awarding custody of the children. *Duke v. Duke*, 181 Ga. 21, 181 S.E. 161 (1935).

When a habeas corpus proceeding is filed in the probate court involving custody of a minor child, and subsequently a petition is filed involving divorce, alimony, and custody of such child, equity has the power to enjoin the habeas corpus proceeding and determine all the issues in one action. *Duke v. Duke*, 181 Ga. 21, 181 S.E. 161 (1935).

Superior court is not without jurisdiction to make an award of custody of minor



children pending divorce litigation, despite pendency of a habeas corpus proceeding involving one of the children before the judge of the probate court between the same parties. *Moody v. Moody*, 193 Ga. 699, 19 S.E.2d 504 (1942).

**Common-law rule abolished.** — In controversies over custody of children, the common-law rule vesting custody in the father was abolished by this section. *Adams v. State*, 218 Ga. 130, 126 S.E.2d 624, answer conformed to, 106 Ga. App. 531, 127 S.E.2d 477 (1962).

**Mother and father have equal status before habeas court.** *Gambrell v. Gambrell*, 244 Ga. 178, 259 S.E.2d 439 (1979).

**Change of custody if circumstances have changed.** — This section does not vest in the court discretion to change a previous judgment awarding custody of the child, in the absence of a change of circumstances involving the welfare of the child which has taken place since rendition of such former judgment. *Beavers v. Williams*, 194 Ga. 875, 23 S.E.2d 171 (1942).

This section means that even in the face of a former judgment awarding custody that has become final, a habeas corpus court is authorized to change custody of a child if conditions affecting the child's welfare have changed since rendition of the former judgment. *Robinson v. Ashmore*, 232 Ga. 498, 207 S.E.2d 484 (1974), overruled on other grounds, *Durden v. Barron*, 249 Ga. 686, 290 S.E.2d 923 (1982).

**Vesting of custody in surviving parent on death of custodial parent subject to court's discretion.** — General rule that upon death of the parent who has custody of a child under a divorce decree the right of custody is vested in the surviving parent is subject to the discretionary power of habeas corpus courts. *Perkins v. Courson*, 219 Ga. 611, 135 S.E.2d 388 (1964).

It was the general rule that on the death of a parent who held custody of a child under a divorce decree, right of custody vested in the surviving parent, but this rule was subject to the discretionary power of habeas corpus courts under former Code 1933, §§ 50-121 and 74-106 (see

now O.C.G.A. §§ 9-14-2 and 19-9-2), looking to the child's interest and welfare. *Peck v. Shierling*, 222 Ga. 60, 148 S.E.2d 491 (1966), later appeal, 223 Ga. 1, 152 S.E.2d 868 (1967).

**Cited in** *Beck v. Beck*, 134 Ga. 137, 67 S.E. 543 (1910); *Crapps v. Smith*, 9 Ga. App. 400, 71 S.E. 501 (1911); *Williman v. Williman*, 138 Ga. 188, 74 S.E. 1077 (1912); *Rourke v. O'Neill*, 150 Ga. 282, 103 S.E. 428 (1920); *Jackson v. Jackson*, 182 Ga. 131, 185 S.E. 89 (1936); *Shipps v. Shipps*, 186 Ga. 494, 198 S.E. 230 (1938); *Pruitt v. Butterfield*, 189 Ga. 593, 6 S.E.2d 786 (1940); *Willingham v. Willingham*, 192 Ga. 405, 15 S.E.2d 514 (1941); *Kniepkamp v. Richards*, 192 Ga. 509, 16 S.E.2d 24 (1941); *Kilgore v. Tiller*, 194 Ga. 527, 22 S.E.2d 150 (1942); *Bond v. Norwood*, 195 Ga. 383, 24 S.E.2d 289 (1943); *Fortson v. Fortson*, 195 Ga. 750, 25 S.E.2d 518 (1943); *Faughnan v. Ross*, 197 Ga. 21, 28 S.E.2d 119 (1943); *Beavers v. Williams*, 199 Ga. 114, 33 S.E.2d 343 (1945); *Harter v. Davis*, 199 Ga. 503, 34 S.E.2d 657 (1945); *Richardson v. Hall*, 199 Ga. 602, 34 S.E.2d 888 (1945); *Moody v. Pike*, 200 Ga. 243, 36 S.E.2d 752 (1946); *Waller v. Waller*, 202 Ga. 535, 43 S.E.2d 535 (1947); *Good v. Good*, 205 Ga. 112, 52 S.E.2d 610 (1949); *Walker v. Steele*, 206 Ga. 674, 58 S.E.2d 421 (1950); *Cons v. Wipert*, 207 Ga. 621, 63 S.E.2d 370 (1951); *Bridgman v. Elders*, 213 Ga. 257, 98 S.E.2d 547 (1957); *Perry v. Perry*, 213 Ga. 847, 102 S.E.2d 534 (1958); *Bartlett v. Bartlett*, 99 Ga. App. 770, 109 S.E.2d 821 (1959); *Adams v. Heffernan*, 217 Ga. 404, 122 S.E.2d 735 (1961); *Blood v. Earnest*, 217 Ga. 642, 123 S.E.2d 913 (1962); *Bosson v. Bosson*, 223 Ga. 793, 158 S.E.2d 231 (1967); *Bowen v. Bowen*, 223 Ga. 800, 158 S.E.2d 233 (1967); *Kerry v. Brown*, 224 Ga. 200, 160 S.E.2d 832 (1968); *Harper v. Ballensinger*, 121 Ga. App. 390, 174 S.E.2d 182 (1970); *White v. Bryan*, 237 Ga. 349, 223 S.E.2d 710 (1976); *Childs v. Childs*, 237 Ga. 177, 227 S.E.2d 49 (1976); *Edwards v. Edwards*, 237 Ga. 779, 229 S.E.2d 632 (1976); *Dyer v. Allen*, 238 Ga. 516, 233 S.E.2d 772 (1977); *George v. Sizemore*, 238 Ga. 525, 233 S.E.2d 779 (1977); *Warren v. Warren*, 238 Ga. 532, 233 S.E.2d 785 (1977); *Guest v. Williams*, 240 Ga. 316, 240 S.E.2d 705 (1977);



**General Consideration (Cont'd)**

Gazaway v. Brackett, 241 Ga. 127, 244 S.E.2d 238 (1978); Sanders v. Sanders, 242 Ga. 641, 250 S.E.2d 488 (1978); Harbin v. Sandlin, 243 Ga. 677, 256 S.E.2d 360 (1979); Munday v. Munday, 243 Ga. 863, 257 S.E.2d 282 (1979); Bryant v. Wigley, 246 Ga. 155, 269 S.E.2d 418 (1980).

**Discretion of Court**

**This section allows the trial court judge to exercise legal discretion** in ruling on whether or not the person having custody is unfit or has otherwise forfeited custody rights to the child. Wood v. McGee, 241 Ga. 242, 244 S.E.2d 846 (1978).

**Discretion of judge.** — On the hearing of a writ of habeas corpus brought by a father on account of detention of his child, he is not entitled as a matter of right to the child's custody, but the matter is in the discretion of the court, on hearing all the facts; such discretion is vested in the court hearing the habeas corpus, and not in the reviewing court. Smith v. Bragg, 68 Ga. 650 (1882).

In passing upon the questions raised by the petition and answer in a habeas corpus case for possession of minor children, discretion is given by law to the trial judge, who sees and hears the parties, witnesses, and children, and who necessarily has superior opportunities for determining correctly the issues involved. Weathersby v. Jordan, 124 Ga. 68, 52 S.E. 83 (1905). See also Starr v. Barton, 34 Ga. 99 (1864); Payne v. Payne, 39 Ga. 174 (1869).

In all habeas corpus cases for custody of a wife or child, the court, on the hearing, is authorized and required to exercise sound discretion in awarding custody, and is empowered to give custody of a child to a third person. Pruitt v. Butterfield, 189 Ga. 593, 6 S.E.2d 786 (1940).

**Discretion conferred on courts by this section is applicable to all courts** authorized to grant writ including probate court. Barlow v. Barlow, 141 Ga. 535, 81 S.E. 433, 52 L.R.A. (n.s.) 683 (1914).

**Discretion given to judge under this section is not arbitrary and unlim-**

ited discretion, but a sound discretion guided by law. Hill v. Rivers, 200 Ga. 354, 37 S.E.2d 386 (1946); Boge v. McCollum, 212 Ga. 741, 95 S.E.2d 665 (1956).

**Discretion is not arbitrary and unlimited.** — In writs of habeas corpus sued out on account of detention of child, the court, on hearing all facts, may exercise the court's discretion as to the person to whom custody of the child will be given; but the discretion to be exercised is not an arbitrary and unlimited discretion, but sound discretion guided by law. Saxon v. Brantley, 174 Ga. 641, 163 S.E. 504 (1932).

**Discretion should ordinarily be exercised in favor of party with legal custody.** — Discretion vested in trial judge upon a hearing on writ of habeas corpus for custody of a child should ordinarily be exercised in favor of the party having legal right to custody of the child. Boge v. McCollum, 212 Ga. 741, 95 S.E.2d 665 (1956).

**Unless child's interest and welfare justifies award to another.** — While judge, upon hearing of a writ of habeas corpus for detention of a child, is vested with discretion in determining to whom the child's custody shall be given, such discretion should be governed by rules of law and be exercised in favor of the party having the legal right, unless evidence shows that the interest and welfare of the child justify the judge in awarding custody to another. Harwell v. Gay, 186 Ga. 80, 196 S.E. 758 (1938); Butts v. Griffith, 189 Ga. 296, 5 S.E.2d 907 (1939); Fowler v. Fowler, 190 Ga. 453, 9 S.E.2d 760 (1940); Girtman v. Girtman, 191 Ga. 173, 11 S.E.2d 782 (1940); Shope v. Singleton, 196 Ga. 506, 27 S.E.2d 26 (1943), overruled in part, Stills v. Johnson, 272 Ga. 645, 533 S.E.2d 695 (2000); Hill v. Rivers, 200 Ga. 354, 37 S.E.2d 386 (1946); Johnson v. Johnson, 211 Ga. 791, 89 S.E.2d 166 (1955); Perkins v. Courson, 219 Ga. 611, 135 S.E.2d 388 (1964).

While judge, on a hearing of writ of habeas corpus for child's custody, is vested with discretion in determining to whom custody should be given, such discretion should be governed by rules of law and exercised in favor of the party having the legal right, unless the evidence shows that



the child's interest and welfare justify the award of custody to another, when rivalry between parents as to their child's custody is not involved. *Connor v. Rainwater*, 200 Ga. 866, 38 S.E.2d 805 (1946).

Discretion vested in trial judge in habeas corpus proceedings with respect to award of custody of minor children ought to be exercised in favor of the party having the legal right, unless the circumstances of the case and the precedents established would justify the court, acting for the welfare of the child, to refuse to do so. *Lucas v. Smith*, 201 Ga. 834, 41 S.E.2d 527 (1947).

In contest between admitted father of an illegitimate child and third persons, when mother, the only recognized parent, voluntarily released her parental right of custody and control to the third persons, discretion reposed in the trial court in habeas corpus hearing is not arbitrary, but should be exercised in favor of the party having the legal right unless the interest and welfare of the child justifies an award of another. *Day v. Hatton*, 210 Ga. 749, 83 S.E.2d 6 (1954).

This section is not arbitrary but should be exercised in favor of the party having the legal right, unless the interest and welfare of the child justifies an award for another. *Fort v. Alewine*, 223 Ga. 359, 155 S.E.2d 12 (1967).

**Child's welfare justifies overriding rights of person with legal claim.** — While judge, upon a hearing of a writ of habeas corpus for detention of a child, is vested with discretion in determining to whom custody shall be given, such discretion is not free or arbitrary, but is to be governed by rules of law, and should be exercised in favor of the party having the legal right, unless the evidence shows that the interest and welfare of the child would justify a judge in overriding the rights of the person holding the legal claim. *Sherrill v. Sherrill*, 202 Ga. 288, 42 S.E.2d 921 (1947); *Camp v. Bookman*, 204 Ga. 670, 51 S.E.2d 391 (1949).

**Trial court's discretion not controlled by appellate court.** — In a habeas corpus proceeding involving a contest between parents over custody of the minor children, the paramount issue is the welfare and best interest of the children, and

an award made by the judge, based upon the evidence and in the exercise of sound discretion, will not be controlled by the Supreme Court. *Handley v. Handley*, 204 Ga. 57, 48 S.E.2d 827 (1948).

In a habeas corpus proceeding involving a contest between parents over custody of minor children, an award made by the trial judge, based upon the evidence and in the exercise of sound discretion, will not be controlled by the appellate court. *Benefield v. Benefield*, 216 Ga. 593, 118 S.E.2d 464 (1961); *Griffis v. Griffis*, 229 Ga. 587, 193 S.E.2d 620 (1972).

Changed conditions affecting the welfare of a child, occurring after rendition of a former final custody judgment, which will warrant issuance of new judgment by a habeas corpus court effecting a change of custody or visitation rights, is essentially a fact issue in each individual case which must be decided by the habeas corpus court, and if there is reasonable evidence in the record to support the court's decision in changing custody or visitation rights, then the decision of the habeas corpus court must prevail as a final judgment and will be affirmed on appeal. *Robinson v. Ashmore*, 232 Ga. 498, 207 S.E.2d 484 (1974), overruled on other grounds, *Durden v. Barron*, 249 Ga. 686, 290 S.E.2d 923 (1982).

**Absent gross abuse.** — In habeas corpus proceedings involving custody of children, the judge must look to the welfare of the children and has very wide discretion, within legal limits, in reference to such matters; when the judge's decision is within the judge's discretion, gross abuse must appear in order to work reversal of the judge's judgment. *Lucas v. Smith*, 201 Ga. 834, 41 S.E.2d 527 (1947).

**Judgment without supporting evidence as gross abuse.** — On hearing a writ of habeas corpus, it is an improper exercise of discretion to render a judgment depriving one legally entitled to custody of a minor child of that custody, and awarding such custody to another, when there is undisputed evidence showing a right and fitness of the former to have such custody and no evidence to the contrary. *Saxon v. Brantley*, 174 Ga. 641, 163 S.E. 504 (1932).

While trial court has wide discretion in



**Discretion of Court (Cont'd)**

passing on the evidence upon a writ of habeas corpus for child custody, a judgment without any evidence to support it is a gross abuse of discretion and cannot be allowed to stand. *Dutton v. Freeman*, 213 Ga. 445, 99 S.E.2d 204 (1957).

**Third Persons**

**Court's discretion limited when parent and third person dispute custody.** — Former Code 1933, §§ 50-121 and 74-106 (see now O.C.G.A. §§ 9-14-2 and 19-9-2) have been construed to give only limited discretion to a trial judge when a parent and a third person are disputing custody of a child. *Spitz v. Holland*, 243 Ga. 9, 252 S.E.2d 406 (1979).

**Discretion to award custody to third person when parent is found unfit.** — Legal or parental right to custody is subject to challenge on the ground of unfitness for the trust, and court in habeas corpus cases has discretion to award custody to a third person when such unfitness is found. *Perkins v. Courson*, 219 Ga. 611, 135 S.E.2d 388 (1964).

Court in habeas corpus cases has discretion to award custody to a third person when parental unfitness is found. *Peck v. Shierling*, 222 Ga. 60, 148 S.E.2d 491 (1966), later appealed, 223 Ga. 1, 152 S.E.2d 868 (1967).

**No discretion to award custody to third person unless parental rights have been lost.** — When there was a contest between a parent and a third party over custody of a minor child, the first question to be determined was whether or not parental control had been lost by the parent; while former Code 1933, § 50-121 (see now O.C.G.A. § 9-14-2) stated that the court may exercise discretion as to whom custody shall be given, it can apply only if the parent had lost control by one of the methods stated in former Code 1933, §§ 74-108 — 74-1101 (see now O.C.G.A. §§ 19-7-1 and 19-7-4). *Morris v. Grant*, 196 Ga. 692, 27 S.E.2d 295 (1943), overruled on other grounds, *White v. Bryan*, 236 Ga. 349, 223 S.E.2d 710 (1976); *Skinner v. Skinner*, 204 Ga. 635, 51 S.E.2d 420 (1949); *Morrison v.*

*Morrison*, 212 Ga. 48, 90 S.E.2d 402 (1955); *Woods v. Martin*, 212 Ga. 405, 93 S.E.2d 339 (1956), overruled on other grounds, *White v. Bryan*, 236 Ga. 349, 223 S.E.2d 710 (1976).

Discretion vested in the judge by this section is not free or arbitrary but is to be governed by rules of law and should be exercised in favor of the party having the legal right, unless evidence shows that such party has lost the party's right in some way recognized by law. *Watkins v. Terrell*, 196 Ga. 651, 27 S.E.2d 329 (1943).

In reaching judgment on a habeas corpus proceeding involving custody of a minor child, the presiding judge should award custody to the person legally entitled thereto, unless it is made to appear that the person lost this right or that the security, morals, or welfare and interest of the child require another disposition. *Hill v. Rivers*, 200 Ga. 354, 37 S.E.2d 386 (1946).

**This section is applicable only when parental control has been lost.** *Waldrup v. Crane*, 203 Ga. 388, 46 S.E.2d 919 (1948), overruled on other grounds, *Perkins v. Courson*, 219 Ga. 611, 135 S.E.2d 388 (1964).

After the mother of child to whom custody had been awarded by a divorce decree died, prima facie right of custody automatically inures to father; in such circumstances, the father's right to custody can be lost only by one of the grounds provided under former Code 1933, §§ 74-108 — 74-110 (see now O.C.G.A. §§ 19-7-1 and 19-7-4), and unless so lost, discretion reposed in trial judge under former Code 1933, § 50-121 (see now O.C.G.A. § 9-14-2) did not apply. *Baynes v. Cowart*, 209 Ga. 376, 72 S.E.2d 716 (1952), overruled on other grounds, *Perkins v. Courson*, 219 Ga. 611, 135 S.E.2d 388 (1964).

Trial court, upon hearing a writ of habeas corpus for detention of a child, was vested with discretion in determining to whom the child's custody shall be given; such discretion should be governed by the rules of law and be exercised in favor of the party having the prima facie legal right to custody of the child, unless the evidence showed that such person had lost the right to custody through one of the



ways recognized in former Code 1933, §§ 74-108 — 74-110 (see now O.C.G.A. §§ 19-7-1 and 19-7-4) or through unfitness. *Wentworth v. Middleton*, 242 Ga. 43, 247 S.E.2d 846 (1978); *Dein v. Mossman*, 244 Ga. 866, 262 S.E.2d 83 (1979).

**Tests for determining custody as between parents and as between parent and third person distinguished.**

— In divorce action in which child custody is an issue, test for use by the trial court in determining which parent shall have child custody is the best interests of the child, but when a third party, such as a grandparent, is being awarded custody of a child as part of a divorce case, or when a third party sues to obtain child custody from a parent, the test is not simply the “best interests” or “welfare” of the child; in such cases, a parent is entitled to be awarded custody by the trial court, unless it is shown by clear and convincing evidence that such parent is unfit or otherwise not entitled to custody under the laws. *Higbee v. Tuck*, 242 Ga. 376, 249 S.E.2d 62 (1978). But see *Durden v. Barron*, 249 Ga. 686, 290 S.E.2d 923 (1982).

**Clear and satisfactory proof required for award to third person.** — Rule in habeas corpus cases is that a parent may lose custody to a third person upon the ground that the parent is unfit for custody, if it is shown by clear and satisfactory proof that the circumstances of the case justify the court in acting for the best interest and welfare of the child. *Shaddrix v. Womack*, 231 Ga. 628, 203 S.E.2d 225 (1974).

**Procedural Matters**

**Strict technical pleadings are not required in habeas corpus proceeding** between rival contestants for custody of minor children; when a writ has been issued and in response thereto the children have been brought into court, the better practice is to inquire into the evidence necessary to a proper decision of the case, unless the petition alleges facts which show affirmatively as a matter of law that the respondent is entitled to custody of the children. *Sheppard v. Sheppard*, 208 Ga. 422, 67 S.E.2d 131 (1951).

**Lack of application for writ of habeas corpus.** — When custody of an infant child was sought by one having a right thereto, writ of habeas corpus would not be dismissed on the ground that the judge who issued the warrant directing the sheriff to take custody of the child until the date of the habeas hearing fixed in the warrant based the warrant upon an affidavit, and that no regular application for the writ of habeas corpus had been filed; the judge did not err in allowing an amendment which was in substance a regular application for the writ, to make the proceedings regular and formal, before the writ was issued authorizing the sheriff to take custody of the child. *Vincent v. Vincent*, 181 Ga. 355, 182 S.E. 180 (1935), overruled on other grounds sub nom. *Camp v. Camp*, 213 Ga. 65, 97 S.E.2d 125 (1957).

**Procedure for trial of habeas.** — No different procedure is provided for obtaining trial of writ of habeas corpus under this section than for trial of habeas corpus generally; rather, it is contemplated that the writ shall issue and be tried under this section as provided for habeas corpus generally. *Collard v. McCormick*, 162 Ga. 116, 132 S.E. 757 (1926).

**Evidence in habeas proceedings.** — Court is not required to sanction the use of affidavits in habeas corpus proceedings, and on hearing under writ of habeas corpus involving custody of a child, the better practice is to require testimony to be delivered from the stand or by depositions or interrogatories duly taken with the privilege of cross-examination preserved, where practicable. *Camp v. Camp*, 213 Ga. 65, 97 S.E.2d 125 (1957).

Pursuant to former Code 1933, §§ 50-121 and 74-107 (see now O.C.G.A. § 19-9-3), it was incumbent upon a trial judge to hear evidence from both contesting parties with respect to what disposition of the child would be in the child's best interest; for one of the parties to be prohibited from presenting evidence would be an improper exercise of the discretion lodged in the trial court. *Mitchell v. Ward*, 231 Ga. 671, 203 S.E.2d 484 (1974).

**All facts and conditions up to entry of judgment to be considered.** — Judg-



**Procedural Matters (Cont'd)**

ment in a habeas corpus case establishes the rights of the parents to custody of their children under the facts existing at the time of rendition of the judgment; thus, the trial court must consider all facts and conditions which present themselves up to the time of rendering the judgment, not merely facts and conditions which occur prior to filing of the petition. *Westmoreland v. Westmoreland*, 243 Ga. 77, 252 S.E.2d 496 (1979).

**Conclusiveness of judgments on habeas.** — While judgments in habeas corpus proceedings instituted by parents to secure custody of their minor children are conclusive upon the parents, such conclusiveness relates to the status existing at the time of the rendition of such judgments; change of status may authorize a different judgment in a subsequent proceeding. *Handley v. Handley*, 204 Ga. 57, 48 S.E.2d 827 (1948).

Judgment in a habeas corpus proceeding instituted by parents to secure custody of their minor children is conclusive upon the parents unless a material change of circumstances affecting the welfare of the children is made to appear. *Handley v. Handley*, 204 Ga. 57, 48 S.E.2d 827 (1948).

Judgment in a habeas corpus case is impressed with the same degree of finality on the facts as they then exist as is any other decision of any court involving custody of minor children. *Johnson v. Johnson*, 211 Ga. 791, 89 S.E.2d 166 (1955).

**Reversal of probate court by superior court held error.** — When probate court hearing a habeas corpus case awarded custody of the children to the mother, it was error for the superior court to reverse the probate court's judgment. *Coleman v. Way*, 217 Ga. 366, 122 S.E.2d 104 (1961).

**Specific Application**

**Award to mother rather than brother upheld.** — Upon trial of a ha-

beas corpus proceeding, involving right to custody of 13 year old girl, court did not err in awarding such custody to the child's widowed mother, rather than to the child's unmarried 21 year old brother, it being shown that the mother was of good character and able to care for her daughter. *Beck v. Beck*, 134 Ga. 137, 67 S.E. 543 (1910).

**Award to grandmother as abuse of discretion when father not unfit.** — When father of a child is a man of good character, has a regular job, is well able financially to support a child, maintains a home of good environment, and there is no evidence showing his abuse or ill treatment of the child, the trial judge abused the judge's discretion in awarding custody of the child to the maternal grandmother. *Hill v. Rivers*, 200 Ga. 354, 37 S.E.2d 386 (1946).

**Grandparents held to have no equitable or prescriptive right to custody.** — When, in a habeas corpus proceeding, a divorced father sought to regain custody of a son from the boy's grandfather, the fact that final order granting custody to the father was not filed until six months after the evidentiary hearing did not create an equitable or prescriptive right to custody in the grandparents. *Hilliard v. Hilliard*, 243 Ga. 424, 254 S.E.2d 372 (1979).

**Discretion of court as to custody of minor wife.** — When a husband and a parent are both claiming custody of a minor wife, the discretion of the presiding judge in awarding the possession of her person will not be interfered with unless grossly abused. *Boyd v. Glass*, 34 Ga. 253, 89 Am. Dec. 252 (1866); *Gibbs v. Brown*, 68 Ga. 803 (1882). See also *Atkinson v. Atkinson*, 160 Ga. 480, 128 S.E. 765 (1925).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, §§ 72, 74, 75, 143, 160.

**Am. Jur. Pleading and Practice Forms.** — 13 Am. Jur. Pleading and Practice Forms, Habeas Corpus, § 238.



**C.J.S.** — 39 C.J.S., Habeas Corpus, §§ 217, 222 et seq. 39A C.J.S., Habeas Corpus, §§ 427, 428.

**ALR.** — Pending suit for annulment, divorce, or separation as affecting remedy by habeas corpus for custody of child, 82 ALR 1146.

Jurisdiction of court in divorce suit to award custody of child as affected by orders in, or pendency of, proceedings in habeas corpus for custody of child, 110 ALR 745.

Child custody provisions of divorce or separation decree as subject to modification on habeas corpus, 4 ALR3d 1277.

Court's power in habeas corpus proceedings relating to custody of child to adjudicate questions as to child's support, 17 ALR3d 764.

Right of putative father to visitation with child born out of wedlock, 58 ALR5th 669.

### 9-14-3. Petition for writ — Contents.

The application for the writ of habeas corpus shall be by petition in writing, signed by the applicant, his attorney or agent, or some other person in his behalf, and shall state:

(1) The name or description of the person whose liberty is restrained;

(2) The person restraining, the mode of restraint, and the place of detention as nearly as practicable;

(3) The cause or pretense of the restraint. If the restraint is under the pretext of legal process, a copy of the process must be annexed to the petition if this is within the power of the applicant;

(4) A distinct averment of the alleged illegality in the restraint or of any other reason why the writ of habeas corpus is sought; and

(5) A prayer for the writ of habeas corpus. (Orig. Code 1863, § 3910; Code 1868, § 3934; Code 1873, § 4010; Code 1882, § 4010; Penal Code 1895, § 1211; Penal Code 1910, § 1292; Code 1933, § 50-102.)

### JUDICIAL DECISIONS

**Editor's notes.** — Article 2 of this chapter now provides the exclusive procedure for seeking a writ of habeas corpus for persons whose liberty is being restrained by virtue of sentence of a state court of record, expanding the scope of habeas in such cases. See O.C.G.A. §§ 9-14-40 and 9-14-41.

**Duty to issue writ when petition sufficient.** — One who is empowered to issue writ of habeas corpus is under duty to do so if the petition contains the requisite matter, is in due form, duly authenticated, duly presented, and does not show

on the petition's face that the imprisonment is in fact legal. *Rhodes v. Glenn*, 69 Ga. App. 163, 24 S.E.2d 721 (1943).

**Prayer for issuance of writ required.** — Complaint does not meet requirements of this section if the complaint does not pray for issuance of writ. *Harper v. Ballensinger*, 225 Ga. 863, 171 S.E.2d 609 (1969).

**Strict pleadings not necessary.** — While this section provides that there must be a distinct averment of the alleged illegality in the restraint and that the cause or pretense of the restraint must be



stated, it will not do to apply to a proceeding of this character the strict rules applicable to pleadings in suits between parties. *Simmons v. Georgia Iron & Coal Co.*, 117 Ga. 305, 43 S.E. 780, 61 L.R.A. 739 (1903); *Wilkinson v. Lee*, 138 Ga. 360, 75 S.E. 477, 42 L.R.A. (n.s.) 1013 (1912).

Question on habeas corpus is whether detention is lawful or not, rather than whether niceties of pleading and exactness of allegation have been duly followed. *Plunkett v. Hamilton*, 136 Ga. 72, 70 S.E. 781, 35 L.R.A. (n.s.) 583, 1972B Ann. Cas. 1259 (1911); *Peebles v. Mangum*, 142 Ga. 699, 83 S.E. 522 (1914).

When petition is merely lacking in that fullness which this section and good pleading require, but it shows that a claim is made by the applicant that detention is illegal, the writ ought not to be quashed after the person detained has been brought into court, but an inquiry into the cause of the detention ought to be instituted. *Vincent v. Vincent*, 181 Ga. 355, 182 S.E. 180 (1935), overruled on other grounds, *Camp v. Camp*, 213 Ga. 65, 97 S.E.2d 125 (1957).

Strict technical pleadings are not required in a habeas corpus proceeding between rival contestants for custody of minor children, and unless the petition alleges facts which show affirmatively, as a matter of law, that the respondent is entitled to custody of the children, it is proper to fully inquire into the evidence. *Singleton v. Singleton*, 216 Ga. 790, 119 S.E.2d 558 (1961).

**Amendment to regularize proceedings properly allowed.** — When custody of an infant child is sought by one having a right thereto, writ of habeas corpus will not be dismissed on the ground that the judge who issued the warrant directing the sheriff of the county to take custody of the child until the date of the hearing fixed in the warrant, based the warrant upon an affidavit, and that no regular application for the writ had been

filed; such judge did not err in allowing an amendment which in substance was a regular application for the writ, to make the proceedings regular and formal, before the writ was issued authorizing the sheriff to take custody of the child. *Vincent v. Vincent*, 181 Ga. 355, 182 S.E. 180 (1935), overruled on other grounds, *Camp v. Camp*, 213 Ga. 65, 97 S.E.2d 125 (1957).

**Quashing of petition showing legality of restraint.** — Motion to quash will lie to petition for habeas corpus which shows on the motion's face that the restraint is not illegal. *Singleton v. Singleton*, 216 Ga. 790, 119 S.E.2d 558 (1961).

**Dismissal when petition failed to show illegality.** — When habeas corpus proceedings were started to effect release from sheriff's custody of one charged with being a deserter from the army, and it did not appear on the face of the petition that the party alleged to be deprived of one's liberty and unlawfully detained in custody was not in fact a deserter, there was no error in dismissing the proceedings. *Huff v. Watson*, 149 Ga. 139, 99 S.E. 307 (1919).

**Failure to attach legal process.** — It was error to dismiss a business operator's habeas petition on the ground that the business operator had not complied with O.C.G.A. § 9-14-3 by attaching a copy of the legal process forming the pretext of the business operator's restraint; the court was aware of no authority holding that this was grounds for dismissal of a habeas petition for lack of jurisdiction, and pleadings in a habeas corpus action were to be treated with liberality. *Nguyen v. State*, 282 Ga. 483, 651 S.E.2d 681 (2007).

**Cited in** *Broomhead v. Chisolm*, 47 Ga. 390 (1872); *Sumner v. Sumner*, 117 Ga. 229, 43 S.E. 485 (1903); *Simmons v. Georgia Iron & Coal Co.*, 117 Ga. 305, 43 S.E. 780, 61 L.R.A. 739 (1903); *McBride v. Graeber*, 16 Ga. App. 240, 85 S.E. 86 (1915); *Faughnan v. Ross*, 197 Ga. 21, 28 S.E.2d 119 (1943).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, § 144 et seq.

**Am. Jur. Pleading and Practice Forms.** — 13 Am. Jur. Pleading and Practice Forms, Habeas Corpus, § 18.



**C.J.S.** — 39A C.J.S., Habeas Corpus, § 288 et seq. 55 C.J.S., Marriage, §§ 12, 13.

**ALR.** — Disqualification of judge who presided at trial or of juror as ground of habeas corpus, 124 ALR 1079.

Judgment favorable to convicted criminal defendant in subsequent civil action arising out of same offense as ground for reversal of conviction, 96 ALR3d 1174.

#### 9-14-4. Petition for writ — Verification; to whom presented.

The petition for the writ of habeas corpus must be verified by the oath of the applicant or some other person in his behalf. It may be presented to the judge of the superior court of the circuit in which the illegal detention exists who may order the party restrained of his liberty to be brought before him from any county in his circuit, or it may be presented to the judge of the probate court of the county, except in cases of capital felonies or in which a person is held for extradition under warrant of the Governor. (Cobb's 1851 Digest, p. 543; Code 1863, § 3911; Ga. L. 1868, p. 128, § 1; Code 1868, § 3935; Ga. L. 1872, p. 44, § 1; Code 1873, § 4011; Code 1882, § 4011; Ga. L. 1884-85, p. 50, § 1; Ga. L. 1884-85, p. 470, § 10; Penal Code 1895, § 1212; Penal Code 1910, § 1293; Code 1933, § 50-103.)

### JUDICIAL DECISIONS

**Editor's notes.** — Article 2 of this chapter now provides the exclusive procedure for seeking a writ of habeas corpus for persons whose liberty is being restrained by virtue of sentence of a state court of record, expanding the scope of habeas in such cases. See O.C.G.A. §§ 9-14-40 and 9-14-41.

**Concurrent jurisdiction of probate court and superior court.** — Judges of the probate court and the superior court have equal and concurrent jurisdiction in a habeas corpus proceeding between husband and wife and over the custody of children. *Duke v. Duke*, 181 Ga. 21, 181 S.E. 161 (1935).

**Retention of jurisdiction by court first taking jurisdiction.** — Generally, if two courts have concurrent jurisdiction over subject matter and parties, the court first taking jurisdiction will retain jurisdiction unless some good reason be shown for equitable interference. *Breeden v. Breeden*, 202 Ga. 740, 44 S.E.2d 667 (1947).

After the superior court acquired jurisdiction of the question of custody of a child in a divorce case, the court retained that

jurisdiction for the purpose of rendering a final judgment, and after an attempted dismissal of the proceeding by the wife was ineffectual, the ordinary (now judge of probate court) of the county, to whom the wife presented a petition for the writ of habeas corpus, was without jurisdiction to act upon the petition. *Breeden v. Breeden*, 202 Ga. 740, 44 S.E.2d 667 (1947).

**Jurisdiction of judge of probate court.** — Judge of the probate court of the county in which a person alleged to be restrained of one's liberty is found has jurisdiction to issue the writ of habeas corpus and to inquire into the legality of such restraint, except in capital felonies and in cases when a person is held for extradition under warrant of the Governor. *Day v. Smith*, 172 Ga. 467, 157 S.E. 639 (1931).

**Jurisdiction of superior court over illegal detentions within circuit.** — Judge of the superior court has full jurisdiction to entertain a petition for habeas corpus for any person detained within the judge's circuit, even if the detention is under a judgment of a superior court of



another circuit. *Wilcoxon v. Aldredge*, 192 Ga. 634, 15 S.E.2d 873 (1941), later appeal, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

Judge of the superior court sitting in the judge's circuit has no authority to grant a writ of habeas corpus unless the illegal detention exists in a county of that circuit. *Girtman v. Girtman*, 191 Ga. 173, 11 S.E.2d 782 (1940).

**Application to be brought in judicial circuit where restraint is taking place.** — Application for a writ of habeas corpus must be brought in the judicial circuit in which the restraint or detention is taking place. *Dyer v. Allen*, 238 Ga. 516, 233 S.E.2d 772 (1977).

**Application against individual with custody and control.** — Petition for the writ of habeas corpus by one who is being illegally deprived of one's liberty must be filed in the county where the illegal detention exists and against the individual having the actual physical custody and control of the person detained. *McBurnett v. Warren*, 208 Ga. 225, 66 S.E.2d 49 (1951).

**Venue proper in county of residence of person exercising control.** — Writ of habeas corpus may properly be directed against one who illegally detains another, in the county where the person exercising such illegal restraint resides, even though at the time of issuance of the writ the person detained was in another county or circuit as illegal detention exists when the power of control is exercised. *Fielder v. Sadler*, 193 Ga. 268, 18 S.E.2d 486 (1942).

Since the father exercised ultimate control over the child by virtue of the agency of his family in Pakistan, venue was proper in DeKalb County since DeKalb County was where control over the child was exercised and was within this section as construed. *Salim v. Salim*, 244 Ga. 513, 260 S.E.2d 894 (1979).

**Presence of child in foreign jurisdiction not fatal to jurisdiction.** — In habeas corpus proceedings to recover custody of a child, mere fact that such child is in a foreign jurisdiction at the time of the petition will not deprive the court of jurisdiction, nor be sufficient excuse for not producing child in obedience to the writ.

*Crowell v. Crowell*, 190 Ga. 501, 9 S.E.2d 628 (1940).

**Petitioner who is not serving state sentence** must bring petition where illegal detention exists. *Smith v. State*, 234 Ga. 390, 216 S.E.2d 111 (1975).

**Place of conviction as equivalent of place of restraint when petitioner not incarcerated.** — Individual who is not incarcerated anywhere can attack an old conviction, and in such a case the place of restraint, the equivalent of "illegal detention," would be the place of conviction. *Smith v. State*, 234 Ga. 390, 216 S.E.2d 111 (1975).

**Venue when petitioner is confined in federal prison.** — When a petitioner is restrained of one's liberty within the federal penal system in this state, the venue of action in the nature of habeas corpus against the state is in the superior court of the county where one is incarcerated by federal authorities. *Smith v. State*, 234 Ga. 390, 216 S.E.2d 111 (1975).

**Venue does not become improper merely because party subsequently moves** to another county. *Westmoreland v. Westmoreland*, 243 Ga. 77, 252 S.E.2d 496 (1979).

**Waiver of personal jurisdiction by respondent.** — Although a judge may have no authority to issue a writ of habeas corpus beyond certain territorial limits, yet when the judge does and the respondent obeys its mandate, plea that the court had no jurisdiction to issue the writ should be overruled and the cause of the detention inquired into. *Simmons v. Georgia Iron & Coal Co.*, 117 Ga. 305, 43 S.E. 780, 61 L.R.A. 739 (1903); *Fielder v. Sadler*, 193 Ga. 268, 18 S.E.2d 486 (1942).

**No waiver of personal jurisdiction when § 9-14-9 utilized.** — Waiver of personal jurisdiction brought about by production of the person detained would not have application when such person's presence was brought about by recourse to former Code 1933, § 50-109 (see now O.C.G.A. § 9-14-9). *Fielder v. Sadler*, 193 Ga. 268, 18 S.E.2d 486 (1942).

**No jurisdiction to make award when parent with legal custody not made party.** — Superior court was without jurisdiction to award custody of child to mother in habeas corpus proceeding by



mother against child's grandparent, when the evidence disclosed that legal and physical custody of the child was in the father, who was not a party to the proceeding. *Gibson v. Wood*, 209 Ga. 535, 74 S.E.2d 456 (1953).

**Failure to show jurisdiction over respondent.** — In habeas corpus action for child custody when the petition did not allege that the defendant was a resident of the county but alleged a belief that he was a resident, the petition failed to show that the court had jurisdiction of the father and was subject to general demurrer (now motion to dismiss) specifically pointing out this defect. *Dutton v. Freeman*, 213 Ga. 445, 99 S.E.2d 204 (1957).

**Averments on information and belief held not fatal to writ.** — Fact that averments of a petition for habeas corpus which it was claimed showed the detention to be illegal were made on "information and belief" was not ground for quashing the writ or refusing to issue the writ, especially when the application was made by a person other than the one alleged to be restrained of one's liberty. *Simmons v. Georgia Iron & Coal Co.*, 117 Ga. 305, 43 S.E. 780, 61 L.R.A. 739 (1903).

**Motion for custody construed as application for habeas.** — Motion for cus-

tody of a minor filed by the natural father is nothing more than an application for a writ of habeas corpus or a complaint in the nature of habeas corpus, and such an action must originate in the superior court or probate court. *In re J.R.T.*, 233 Ga. 204, 210 S.E.2d 684 (1974).

**Petition was time barred.** — Grant of the habeas petition was reversed, the reviewing court found that because the prisoner could not show that the prisoner was entitled to relief based on a newly recognized right that was retroactively applicable to cases on collateral review, the prisoner's habeas petition was barred by the four-year statute of limitations period. *State v. Sosa*, 291 Ga. 734, 733 S.E.2d 262 (2012).

**Cited in** *Hobbs v. Evans*, 173 Ga. 610, 160 S.E. 872 (1931); *Vincent v. Vincent*, 181 Ga. 355, 182 S.E. 180 (1935); *Hardy v. MacKinnon*, 107 Ga. App. 120, 129 S.E.2d 391 (1962); *Gude v. State*, 229 Ga. 831, 194 S.E.2d 445 (1972); *Hancock v. Lewis*, 230 Ga. 642, 198 S.E.2d 673 (1973); *Mathis v. Sapp*, 232 Ga. 620, 208 S.E.2d 446 (1974); *Griggs v. Griggs*, 233 Ga. 752, 213 S.E.2d 649 (1975); *Whitlock v. Barrett*, 158 Ga. App. 100, 279 S.E.2d 244 (1981).

## OPINIONS OF THE ATTORNEY GENERAL

**Former Code 1933, § 50-103 (see now O.C.G.A. § 9-14-4) should be construed in connection with former Code 1933, § 50-104 (see now O.C.G.A. § 9-14-5).** 1945-47 Op. Att'y Gen. p. 353.

**Writ returnable to any county in**

**circuit.** — Superior court judge may make a writ of habeas corpus returnable to any county in the circuit, but the proceedings should be recorded in the county where the detention occurred. 1945-47 Op. Att'y Gen. p. 353.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, § 98.

**C.J.S.** — 39A C.J.S., Habeas Corpus, § 272.

**ALR.** — Right of one arrested on extradition warrant to delay to enable him to present evidence that he is not subject to extradition, 11 ALR 1410.

Right to prove absence from demanding

state or alibi on habeas corpus in extradition proceedings, 51 ALR 797; 61 ALR 715.

Determination in extradition proceedings, or on habeas corpus in such proceedings, whether a crime is charged, 81 ALR 552; 40 ALR2d 1151.

Discharge on habeas corpus of one held in extradition proceedings as precluding subsequent extradition proceedings, 33 ALR3d 1443.



### 9-14-5. When writ granted.

When upon examination of the petition for a writ of habeas corpus it appears to the judge that the restraint of liberty is illegal, he shall grant the writ, requiring the person restraining the liberty of another or illegally detaining such person in his custody to bring the person before him at a time and place to be specified in the writ for the purpose of an examination into the cause of the detention. (Orig. Code 1863, § 3912; Code 1868, § 3936; Code 1873, § 4012; Code 1882, § 4012; Penal Code 1895, § 1213; Penal Code 1910, § 1294; Code 1933, § 50-104.)

### JUDICIAL DECISIONS

**Editor's notes.** — Article 2 of this chapter now provides the exclusive procedure for seeking a writ of habeas corpus for persons whose liberty is being restrained by virtue of sentence of a state court of record, expanding the scope of habeas in such cases. See O.C.G.A. §§ 9-14-40 and 9-14-41.

**Trial judge to whom petition for habeas corpus is presented may take judicial notice of record** in the case and of what has taken place in the judge's presence, and when it plainly appears therefrom that there is no legal ground for the writ, the judge may decline to grant the writ. *Woodruff v. Balkcom*, 205 Ga. 445, 53 S.E.2d 680, cert. denied, 338 U.S. 829, 70 S. Ct. 79, 94 L. Ed. 504 (1949).

**Dismissal without hearing authorized when petition without merit.** — Petitioner in a habeas corpus proceeding is generally entitled to a hearing on the questions raised by the petition; however, when the petition and exhibits attached thereto disclose without contradiction that the petition is without merit, it is not error to dismiss the writ without a hearing. *Marshall v. Hutson*, 245 Ga. 849, 268 S.E.2d 338 (1980).

**Reservation of allegations for use in second writ as abuse of habeas.** — Applicant for the writ of habeas corpus may not, without excuse, withhold allegations from the applicant's petition, and thereafter use them on a second attempt, if the first should fail, since to reserve such allegations for use in a later writ is to make an abusive use of habeas corpus. *Woodruff v. Balkcom*, 205 Ga. 445, 53 S.E.2d 680, cert. denied, 338 U.S. 829, 70 S. Ct. 79, 94 L. Ed. 504 (1949).

**Detention of the applicant was not shown to be unlawful** by the fact that the applicant had been arrested under a previous warrant and discharged therefrom on habeas corpus since it appeared that such previous warrant was issued for an offense different from that stated in either the misdemeanor or the felony warrant under which the applicant was last arrested. *Paulk v. Sexton*, 203 Ga. 82, 45 S.E.2d 768 (1947).

**Petition should have been granted.** — Since a trial court did not inform an inmate that by entering guilty pleas to multiple burglary counts, the inmate was waiving important rights under U.S. Const., Amend. VI to the inmate's privilege against compulsory self-incrimination, the inmate's right to trial by jury, and the inmate's right to confront the inmate's accusers, the inmate's pleas were not constitutionally valid and, accordingly, the inmate's habeas petition pursuant to O.C.G.A. § 9-14-5 should have been granted; since there was no affirmative showing that an inmate's pleas were made knowingly, intelligently, and voluntarily, the pleas were not valid as there was only evidence that a form which the inmate had executed at the time indicated that the inmate had the right to plead not guilty and to be tried by a jury. *Foskey v. Battle*, 277 Ga. 480, 591 S.E.2d 802 (2004).

Habeas court's finding that a petitioner's guilty pleas were validly entered was reversed as the waiver forms signed by the petitioner and reviewed with the petitioner by the petitioner's attorneys addressed only the right to be tried by a jury;



the waiver forms did not advise the petitioner that the petitioner was waiving the petitioner's right against self-incrimination and the petitioner's confrontation right. *Beckworth v. State*, 281 Ga. 41, 635 S.E.2d 769 (2006).

Habeas corpus relief should be granted to the defendant for the following reasons: first, it was undisputed that the trial court did not fully inform the defendant of the defendant's Boykin rights during the plea hearing; second, there was no evidence of record that the trial court entered into any colloquy with the defendant to ensure that the defendant read and fully understood

the plea agreement which the defendant signed; third, there was no evidence that the defendant's trial counsel discussed the defendant's Boykin rights with the defendant or that it was counsel's standard practice to do so; and, finally, there was no evidence that the trial counsel actually went over the plea agreement with the defendant or any of the information that the plea agreement contained. *State v. Hemdani*, 282 Ga. 511, 651 S.E.2d 734 (2007).

**Cited in** *Harwell v. Gay*, 186 Ga. 80, 196 S.E. 758 (1938).

## OPINIONS OF THE ATTORNEY GENERAL

**Former Code 1933, § 39-105** (see now O.C.G.A. § 9-13-4) **should be construed in connection with** former Code 1933, § 50-104 (see now O.C.G.A. § 9-14-5). 1945-47 Op. Att'y Gen. p. 353.

**Meaning of section.** — This section provides that when a petition is presented, and it appears to the judge that the restraint is illegal, the judge shall grant the writ and require the person restraining the liberty of another to bring

such person before the judge, at a time and place specified in the writ for examination into the cause of detention. 1945-47 Op. Att'y Gen. p. 353.

**Writ returnable to any county in circuit.** — Superior court judge may make a writ of habeas corpus returnable to any county in the circuit, but the proceedings should be recorded in the county where the detention occurred. 1945-47 Op. Att'y Gen. p. 353.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, § 12.

**Am. Jur. Pleading and Practice Forms.** — 13 Am. Jur. Pleading and Practice Forms, Habeas Corpus, § 129.

**C.J.S.** — 39 C.J.S., Habeas Corpus, §§ 52, 53.

**ALR.** — Habeas corpus to test constitutionality of ordinance under which petitioner is held, 32 ALR 1054.

Power to grant writ of habeas corpus pending appeal from conviction, 52 ALR 876.

Illegal or erroneous sentence as ground for habeas corpus, 76 ALR 468.

Determination in extradition proceedings, or on habeas corpus in such proceedings, whether a crime is charged, 81 ALR 552; 40 ALR2d 1151.

Liability of judge, court, administrative officer, of other custodian of person for whose release the writ is sought, in connection with habeas corpus proceedings, 84 ALR 807.

Former jeopardy as ground for habeas corpus, 8 ALR2d 285.

Habeas corpus on ground of deprivation of right to appeal, 19 ALR2d 789.

### 9-14-6. Form of writ.

The writ of habeas corpus may be substantially as follows:



IN THE \_\_\_\_\_ COURT OF \_\_\_\_\_ COUNTY  
STATE OF GEORGIA

A.B.,	)	
Petitioner	)	
	)	
v.	)	Civil action
	)	
C.D.,	)	File no. _____
Respondent	)	

WRIT OF HABEAS CORPUS

To C.D.:

You are hereby commanded to produce the body of \_\_\_\_\_, alleged to be illegally detained by you, together with the cause of the detention, before me on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, at \_\_\_\_: \_\_\_\_ M., then and there to be disposed of as the law directs.

Given under my hand and official signature, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Judge

(Orig. Code 1863, § 3913; Code 1868, § 3937; Code 1873, § 4013; Code 1882, § 4013; Penal Code 1895, § 1214; Penal Code 1910, § 1295; Code 1933, § 50-106; Ga. L. 1999, p. 81, § 9.)

JUDICIAL DECISIONS

**Editor's notes.** — Article 2 of this chapter now provides the exclusive procedure for seeking a writ of habeas corpus for persons whose liberty is being restrained by virtue of sentence of a state court of record, expanding the scope of habeas in such cases. See O.C.G.A. §§ 9-14-40 and 9-14-41.

**Writ as appropriate process to bring defendant into court.** — In a habeas case involving custody of a minor child, the writ of habeas corpus, as prescribed by former Code 1933, § 50-106 (see now O.C.G.A. § 9-14-6), was an appropriate process to bring the defendant

into court and the complaint was not subject to dismissal because the summons prescribed in Ga. L. 1969, p. 487, § 1 and Ga. L. 1966, p. 609, § 11 (see now O.C.G.A. §§ 9-11-4 and 9-11-101) was not issued and served on the defendant. Tyree v. Jackson, 226 Ga. 690, 177 S.E.2d 160 (1970).

**Cited in** Moody v. Moody, 193 Ga. 699, 19 S.E.2d 504 (1942); Moore v. Berry, 210 Ga. 136, 78 S.E.2d 6 (1953); Harper v. Ballensinger, 225 Ga. 863, 171 S.E.2d 609 (1969); Tyree v. Jackson, 226 Ga. 690, 177 S.E.2d 160 (1970).



RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, § 167.

**C.J.S.** — 39A C.J.S., Habeas Corpus, §§ 306, 307.

9-14-7. Return day for writ.

The return day of the writ of habeas corpus in civil cases shall always be within 20 days after the presentation of the petition therefor. The return day of the writ in criminal cases shall always be within eight days after the presentation of the petition therefor. (Orig. Code 1863, § 3914; Code 1868, § 3938; Code 1873, § 4014; Code 1882, § 4014; Penal Code 1895, § 1215; Penal Code 1910, § 1296; Code 1933, § 50-107; Ga. L. 1956, p. 374, § 1.)

JUDICIAL DECISIONS

**Editor’s notes.** — Article 2 of this chapter now provides the exclusive procedure for seeking a writ of habeas corpus for persons whose liberty is being restrained by virtue of sentence of a state court of record, expanding the scope of habeas in such cases. See O.C.G.A. §§ 9-14-40 and 9-14-41.

**Constitutional jurisdiction of Supreme Court not restricted by this section.** — This section, pertaining to the return day for a writ of habeas corpus in a criminal case, does not purport to restrict or limit the constitutional jurisdiction of the Supreme Court in habeas corpus cases. *Goble v. Reese*, 214 Ga. 697, 107 S.E.2d 175 (1959) (see now O.C.G.A. § 9-14-7).

**Return day for civil cases.** — Civil Practice Act (see now O.C.G.A. Ch. 9, T. 11) did not change the requirement that the return day in habeas corpus cases of a civil nature should always be within 20 days after presentation of the petition for

the writ. *Tyree v. Jackson*, 226 Ga. 690, 177 S.E.2d 160 (1970).

**Thirty-day show cause order held not writ.** — Order requiring the defendant to show cause 30 days thereafter “why the prayers of said petition should not be granted” is not a writ within the meaning of this section. *Harper v. Ballensinger*, 225 Ga. 863, 171 S.E.2d 609 (1969).

**Delay caused by petitioner.** — Since it was the petitioner’s actions which frustrated the ability of the county judges to consider the merits of the petitioner’s habeas corpus petition and delayed the holding of the required hearing for months, the court declined the opportunity to order the petitioner released because the temporal requirements of the statute were not met. *Smith v. Nichols*, 270 Ga. 550, 512 S.E.2d 279 (1999).

**Cited in** *McClure v. Hopper*, 234 Ga. 45, 214 S.E.2d 503 (1975).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, §§ 102, 155.

**Am. Jur. Pleading and Practice**

**Forms.** — 13 Am. Jur. Pleading and Practice Forms, Habeas Corpus, § 165.

**C.J.S.** — 39A C.J.S., Habeas Corpus, §§ 310, 311.



**9-14-8. Service of writ.**

The writ of habeas corpus shall be served by delivery of a copy thereof by any officer authorized to make a return of any process or by any other citizen. The entry of the officer or the affidavit of the citizen serving the writ shall be sufficient evidence of the service. The person serving the writ shall exhibit the original if required to do so. If personal service cannot be effected, the writ may be served by leaving a copy at the house, jail, or other place in which the party in whose behalf the writ issues is detained. (Orig. Code 1863, § 3915; Code 1868, § 3939; Code 1873, § 4015; Code 1882, § 4015; Penal Code 1895, § 1216; Penal Code 1910, § 1297; Code 1933, § 50-108.)

**JUDICIAL DECISIONS**

**Editor's notes.** — Article 2 of this chapter now provides the exclusive procedure for seeking a writ of habeas corpus for persons whose liberty is being restrained by virtue of sentence of a state

court of record, expanding the scope of habeas in such cases. See O.C.G.A. §§ 9-14-40 and 9-14-41.

**Cited** in *Nichols v. Love*, 227 Ga. 659, 182 S.E.2d 439 (1971).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, § 151.

**C.J.S.** — 39A C.J.S., Habeas Corpus, § 274.

**9-14-9. When warrant for arrest of person detained to be issued along with writ.**

If the affidavit of the applicant to the effect that he has reason to apprehend that the party detaining or holding another in custody will remove him beyond the limits of the county or conceal him from the officers of the law is filed with the petition, the judge granting the writ shall at the same time issue his warrant directed to the sheriff, deputy sheriff, coroner, or any lawful constable of the county requiring the officers to search for and arrest the body of the person detained and to bring him before the judge to be disposed of as he may direct. (Orig. Code 1863, § 3916; Code 1868, § 3940; Code 1873, § 4016; Code 1882, § 4016; Penal Code 1895, § 1217; Penal Code 1910, § 1298; Code 1933, § 50-109.)

**JUDICIAL DECISIONS**

**Editor's notes.** — Article 2 of this chapter now provides the exclusive procedure for seeking a writ of habeas corpus for persons whose liberty is being restrained by virtue of sentence of a state

court of record, expanding the scope of habeas in such cases. See O.C.G.A. §§ 9-14-40 and 9-14-41.

**No waiver of personal jurisdiction effected by production of person de-**



**tained when this section utilized.** — Although when a respondent who is beyond the territorial limits of the court's jurisdiction nevertheless obeys the mandate of the court by producing the person detained, a plea that the court had no jurisdiction to issue a habeas writ should be overruled and the cause of the deten-

tion inquired into, such waiver does not apply when the presence of the person detained is brought about by recourse to this section so that the person detained is brought into court, not by act of the respondent, but under process directed to the arresting officer. *Fielder v. Sadler*, 193 Ga. 268, 18 S.E.2d 486 (1942).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, §§ 106, 159.

**C.J.S.** — 39A C.J.S., Habeas Corpus, § 316.

**ALR.** — Determination, in extradition proceedings, or on habeas corpus in such proceedings, whether a crime is charged, 40 ALR2d 1151.

### 9-14-10. Respondent's return to writ — When and where made.

The return of the party served with the writ shall be made at the time and place specified by the court. Two days from the time of service shall be allowed for every 20 miles which the party has to travel from the place of detention to the place appointed for the hearing. If service has not been made a sufficient time before the hearing to cover the time allowed in this Code section to reach the place of hearing, the return shall be made within the time so allowed immediately after the service. (Orig. Code 1863, § 3917; Code 1868, § 3941; Code 1873, § 4017; Code 1882, § 4017; Penal Code 1895, § 1218; Penal Code 1910, § 1299; Code 1933, § 50-110.)

### JUDICIAL DECISIONS

**Editor's notes.** — Article 2 of this chapter now provides the exclusive procedure for seeking a writ of habeas corpus for persons whose liberty is being restrained by virtue of sentence of a state court of record, expanding the scope of habeas in such cases. See O.C.G.A. §§ 9-14-40 and 9-14-41.

**Person to whom writ is directed makes response to the writ, not the petition,** and when an answer is made to the writ, responsibility of the respondent

ceases. *Delinski v. Dunn*, 209 Ga. 402, 73 S.E.2d 171 (1952).

**Return to writ of habeas corpus may be amended** at any time before final disposition of the cause. *Wright v. Davis*, 120 Ga. 670, 48 S.E. 170 (1904); *Harwell v. Gay*, 186 Ga. 80, 196 S.E. 758 (1938).

**Mere failure to comply literally with this section was not cause for reversal.** — See *Bearden v. Donaldson*, 141 Ga. 529, 81 S.E. 441 (1914).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, §§ 102, 155.

**Am. Jur. Pleading and Practice**

**Forms.** — 13 Am. Jur. Pleading and Practice Forms, Habeas Corpus, § 165.

**C.J.S.** — 39A C.J.S., Habeas Corpus, §§ 306, 307.



### 9-14-11. Respondent's return to writ — Verification; production of person detained.

Every return to a writ of habeas corpus shall be under oath. If the custody or detention of the party on whose behalf the writ issues is admitted, his body shall be produced unless prevented by providential cause or prohibited by law. (Orig. Code 1863, § 3918; Code 1868, § 3942; Code 1873, § 4018; Code 1882, § 4018; Penal Code 1895, § 1219; Penal Code 1910, § 1300; Code 1933, § 50-111.)

#### JUDICIAL DECISIONS

**Editor's notes.** — Article 2 of this chapter now provides the exclusive procedure for seeking a writ of habeas corpus for persons whose liberty is being restrained by virtue of sentence of a state court of record, expanding the scope of habeas in such cases. See O.C.G.A. §§ 9-14-40 and 9-14-41.

**Person detained must be produced with return.** — No response will satisfy the writ unless accompanied by the body of the person held in custody, or unless a satisfactory reason for the person's nonproduction is given; if nothing to the contrary appears, it will be presumed on review that the person claimed to have been illegally restrained was before the court at that time. *Simmons v. Georgia Iron & Coal Co.*, 117 Ga. 305, 43 S.E. 780, 61 L.R.A. 739 (1903).

**Amendment to return making mere legal conclusions need not be verified.** — It is not necessary that amend-

ment to return, containing mere formal averments of legal conclusions upon the facts stated in the return, should be under oath. *Wright v. Davis*, 120 Ga. 670, 48 S.E. 170 (1904).

**Verification by one other than respondent held not ground for discharge.** — Under this section, when it appeared from the application itself, as well as from the return, that the applicant was held in custody by the jailer of the county under a sentence of a court, it was proper to refuse to discharge the applicant, on motion, merely because the return was verified by someone other than respondent. *Plunkett v. Hamilton*, 136 Ga. 72, 70 S.E. 781, 35 L.R.A. (n.s.) 583, 1972B Ann. Cas. 1259 (1911).

**There is no requirement that traverse to respondent's answer state any facts or law.** *Beavers v. Smith*, 227 Ga. 344, 180 S.E.2d 717 (1971).

**Cited in** *Harwell v. Gay*, 186 Ga. 80, 196 S.E. 758 (1938).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, §§ 102, 112 et seq.

**C.J.S.** — 39A C.J.S., Habeas Corpus, § 310 et seq.

### 9-14-12. Respondent's return to writ — Statement of transfer of custody; procedure when transfer made to avoid writ.

If the return denies the custody or detention of the person in question, it shall further state distinctly the latest date, if ever, at which custody was had and when and to whom custody was transferred. If it appears that a transfer of custody was made to avoid the writ of habeas corpus, the party making the return may be imprisoned, in the discretion of the judge hearing the case, until the body of the party kept



or detained is produced. (Orig. Code 1863, § 3920; Code 1868, § 3944; Code 1873, § 4020; Code 1882, § 4020; Penal Code 1895, § 1221; Penal Code 1910, § 1302; Code 1933, § 50-113.)

JUDICIAL DECISIONS

**Editor’s notes.** — Article 2 of this chapter now provides the exclusive procedure for seeking a writ of habeas corpus for persons whose liberty is being restrained by virtue of sentence of a state court of record, expanding the scope of habeas in such cases. See O.C.G.A. §§ 9-14-40 and 9-14-41.

**Record held sufficient to show that father sent child to family in Pakistan to avoid writ** of habeas corpus, and father’s arrest and detention was authorized. *Salim v. Salim*, 244 Ga. 513, 260 S.E.2d 894 (1979).

OPINIONS OF THE ATTORNEY GENERAL

**Return of prisoner to county of conviction not authorized when execution of sentence stayed.** — Director of the State Board of Correction (now commissioner of offender rehabilitation)

would not be authorized to return a prisoner to the county of conviction where execution of the sentence was stayed by a habeas corpus proceeding. 1954-56 Op. Att’y Gen. p. 135.

RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, §§ 106, 159.

**C.J.S.** — 39A C.J.S., Habeas Corpus, § 316.

9-14-13. Production of legal process.

In every case in which detention is justified under legal process, the legal process shall be produced and submitted to the judge at the hearing of the return. (Orig. Code 1863, § 3919; Code 1868, § 3943; Code 1873, § 4019; Code 1882, § 4019; Penal Code 1895, § 1220; Penal Code 1910, § 1301; Code 1933, § 50-112.)

JUDICIAL DECISIONS

**Editor’s notes.** — Article 2 of this chapter now provides the exclusive procedure for seeking a writ of habeas corpus for persons whose liberty is being restrained by virtue of sentence of a state court of record, expanding the scope of habeas in such cases. See O.C.G.A. §§ 9-14-40 and 9-14-41.

**law.** — Since the respondent held petitioner under an executive warrant based upon an extradition proceeding, and the warrant was regular on the warrant’s face, the presumption was that the Governor had complied with the Constitution and the law. *Blackwell v. Jennings*, 128 Ga. 264, 57 S.E. 484 (1907).

**Presumption of compliance with**



### 9-14-14. Hearing of issue.

If the return denies any of the material facts stated in the petition or alleges other facts upon which issue is taken, the judge hearing the return may in a summary manner hear testimony as to the issue. To that end, he may compel the attendance of witnesses and the production of papers, may adjourn the examination of the question, or may exercise any other power of a court which the principles of justice may require. (Orig. Code 1863, § 3922; Code 1868, § 3945; Code 1873, § 4021; Code 1882, § 4021; Penal Code 1895, § 1222; Penal Code 1910, § 1303; Code 1933, § 50-114.)

## JUDICIAL DECISIONS

**Editor's notes.** — Article 2 of this chapter now provides the exclusive procedure for seeking a writ of habeas corpus for persons whose liberty is being restrained by virtue of sentence of a state court of record, expanding the scope of habeas in such cases. See O.C.G.A §§ 9-14-40 and 9-14-41.

**Return to writ of habeas corpus is to be heard and determined by judge** granting the writ, not by a jury. *Sumner v. Sumner*, 117 Ga. 229, 43 S.E. 485 (1903).

**State habeas courts will not adjudicate issues already decided** by appellate court on direct appeal unless either the facts or the law has changed. *Zant v. Campbell*, 245 Ga. 368, 265 S.E.2d 22 (1980).

**Guilt or innocence not at issue.** — Courts of the asylum state cannot, upon a writ of habeas corpus by a fugitive, inquire into the guilt or innocence of the accused. *Barranger v. Baum*, 103 Ga. 465, 30 S.E. 524, 68 Am. St. R. 113 (1898); *Blackwell v. Jennings*, 128 Ga. 264, 57 S.E. 484 (1907); *Ellis v. Grimes*, 198 Ga. 51, 30 S.E.2d 921 (1944).

On trial of a habeas corpus proceeding, only the legality of the detention is to be determined, and whether or not one is guilty of the charge upon which the right of custody is claimed is not in issue. *Stephens v. Henderson*, 120 Ga. 218, 47 S.E. 498 (1904); *Hudson v. Jennings*, 134 Ga. 373, 67 S.E. 1037 (1910); *Cross v. Foote*, 17 Ga. App. 802, 88 S.E. 594 (1916).

**Matters to be determined when extradition challenged.** — Once Governor has granted extradition, court in a habeas

corpus proceeding can do no more than decide whether extradition documents on their face are in order; whether the petitioner has been charged with a crime in the demanding state; whether the petitioner is the person named in request for extradition; and whether the petitioner is a fugitive. *Stynchcombe v. Smith*, 244 Ga. 548, 261 S.E.2d 342 (1979).

**Substantial charging of crime at issue in habeas cases involving extradition.** — In cases involving extradition, it is a question of law open to judicial inquiry on habeas corpus as to whether the person demanded was substantially charged with a crime against the laws of the demanding state, but this rule applies to the sufficiency of the indictment or affidavit as a pleading, and not to extraneous evidence as to actual guilt. *Ellis v. Grimes*, 198 Ga. 51, 30 S.E.2d 921 (1944).

**Burden is on applicant for habeas to make out the applicant's case.** *Jones v. Leverett*, 230 Ga. 310, 196 S.E.2d 885 (1973).

**Burden on petitioner.** — In habeas corpus proceeding, the burden was upon petitioner to establish by proof contention that the petitioner was denied the benefit of counsel. *Plocar v. Foster*, 211 Ga. 153, 84 S.E.2d 360 (1954), cert. denied, 349 U.S. 962, 75 S. Ct. 893, 99 L. Ed. 1284 (1955).

There is a presumption in favor of the conviction or judgment unreversed, and that the decision of the court convicting the prisoner was well founded, and the burden is upon the prisoner to overcome this presumption. *Gay v. Balkcom*, 219 Ga. 554, 134 S.E.2d 600 (1964).



**Burden in challenging extradition to overcome presumption favoring executive warrant.** — When, on trial of a habeas corpus case, it appears that the respondent holds the petitioner in custody under an executive warrant based upon an extradition proceeding, and the warrant is regular on the warrant's face, the burden is cast upon the petitioner to show some valid and sufficient reason why the warrant should not be executed; the presumption is that the Governor has complied with the Constitution and the law, and this presumption continues until the contrary appears. *King v. Mount*, 196 Ga. 461, 26 S.E.2d 419 (1943); *Broyles v. Mount*, 197 Ga. 659, 30 S.E.2d 48 (1944); *Ellis v. Grimes*, 198 Ga. 51, 30 S.E.2d 921 (1944).

When, in the trial of a habeas corpus case, it appears that the prisoner is in custody under an executive warrant based upon an extradition proceeding, and the warrant is regular on the warrant's face, the burden is cast upon the prisoner to show some valid and sufficient reason why the warrant should not be executed since there is a presumption that the Governor complied with the Constitution and law and this presumption continues until the contrary appears. *Shelton v. Grimes*, 224 Ga. 451, 162 S.E.2d 426 (1968), cert. de-

nied, 393 U.S. 1089, 89 S. Ct. 853, 21 L. Ed. 2d 782, rehearing denied, 394 U.S. 967, 89 S. Ct. 1301, 22 L. Ed. 2d 569 (1969).

**Question of determining credibility of testimony** in habeas corpus hearing is vested in judge. *Jones v. Leverett*, 230 Ga. 310, 196 S.E.2d 885 (1973).

**Uncontradicted testimony need not be accepted.** — In a habeas corpus hearing, even the uncontradicted testimony of a witness does not have to be accepted. *Jones v. Leverett*, 230 Ga. 310, 196 S.E.2d 885 (1973).

**Ex parte affidavits not admissible over objection.** — Allowance in evidence of ex parte affidavits over timely objection in cases such as habeas corpus proceedings when final judgments are rendered is not authorized. *Camp v. Camp*, 213 Ga. 65, 97 S.E.2d 125 (1957).

**Cited** in *Robertson v. Heath*, 132 Ga. 310, 64 S.E. 73 (1909); *Harwell v. Gay*, 186 Ga. 80, 196 S.E. 758 (1938); *Beavers v. Williams*, 199 Ga. 114, 33 S.E.2d 343 (1945); *Kittel v. Comstock*, 219 Ga. 161, 132 S.E.2d 77 (1963); *Hill v. Griffin*, 224 Ga. 378, 162 S.E.2d 397 (1968); *Johnson v. Caldwell*, 229 Ga. 548, 192 S.E.2d 900 (1972); *Moore v. State*, 141 Ga. App. 245, 233 S.E.2d 236 (1977); *Pulliam v. Balkcom*, 245 Ga. 99, 263 S.E.2d 123 (1980).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, §§ 106, 124, 158.

**C.J.S.** — 39A C.J.S., Habeas Corpus, § 319.

## 9-14-15. To whom notice of hearing given.

If the person who is the subject of a petition for the writ of habeas corpus is detained upon a criminal charge and the district attorney is in the county, he shall be notified of the hearing. If he is not, the notice shall be given to the prosecutor of the criminal charge. (Ga. L. 1851-52, p. 236, § 1; Code 1863, § 3931; Code 1868, § 3954; Code 1873, § 4030; Code 1882, § 4030; Penal Code 1895, § 1233; Penal Code 1910, § 1314; Code 1933, § 50-120.)



## JUDICIAL DECISIONS

**Editor's notes.** — Article 2 of this chapter now provides the exclusive procedure for seeking a writ of habeas corpus for persons whose liberty is being restrained by virtue of sentence of a state court of record, expanding the scope of habeas in such cases. See O.C.G.A. §§ 9-14-40 and 9-14-41.

**Compliance with this section is not jurisdictional**, and failure to raise objection of lack of notice until after judgment amounts to waiver. *Pridgen v. James*, 168 Ga. 770, 149 S.E. 48 (1929).

**Cited** in *Bruce v. Smith*, 274 Ga. 432, 553 S.E.2d 808 (2001).

## RESEARCH REFERENCES

**C.J.S.** — 39A C.J.S., Habeas Corpus, § 275.

**9-14-16. When person not to be discharged.**

No person shall be discharged upon the hearing of a writ of habeas corpus in the following cases:

(1) When he is imprisoned under lawful process issued from a court of competent jurisdiction unless his case is one in which bail is allowed and proper bail is tendered;

(2) By reason of any irregularity in the warrant or commitment where the same substantially conforms to the requirements of law;

(3) For want of bond to prosecute;

(4) When the person is imprisoned under a bench warrant which is regular upon its face;

(5) By reason of any misnomer in the warrant or commitment when the court is satisfied that the person detained is the party charged with the offense;

(6) When the person is in custody for a contempt of court and the court has not exceeded its jurisdiction in the length of the imprisonment imposed; or

(7) In any other case in which it appears that the detention is authorized by law. (Orig. Code 1863, § 3924; Code 1868, § 3947; Code 1873, § 4023; Code 1882, § 4023; Penal Code 1895, § 1224; Penal Code 1910, § 1305; Code 1933, § 50-116.)

**Cross references.** — For further provisions regarding discharge on writ of habeas corpus because of informality in

the commitment or the proceedings prior thereto, see § 17-7-34.



## JUDICIAL DECISIONS

## ANALYSIS

## IN GENERAL

## HABEAS AFTER CONVICTION

## In General

**Editor's notes.** — Article 2 of this chapter now provides the exclusive procedure for seeking a writ of habeas corpus for persons whose liberty is being restrained by virtue of sentence of a state court of record, expanding the scope of habeas in such cases. See O.C.G.A. §§ 9-14-40 and 9-14-41.

**Function of writ of habeas corpus is to inquire into and determine legality of detention** at the time of hearing, such detention being illegal if judgment of conviction is void. *Riley v. Garrett*, 219 Ga. 345, 133 S.E.2d 367 (1963).

**Habeas corpus not substitute for other remedial procedures.** — Habeas corpus cannot be used as a substitute for a motion for new trial, writ of error (see now O.C.G.A. §§ 5-6-49 and 5-6-50), or other remedial procedure. *Gibson v. Balkcom*, 217 Ga. 824, 125 S.E.2d 504 (1962).

Habeas corpus cannot be made a substitute for certiorari, bill of exceptions, or other similar remedial procedure by which errors and irregularities in judgments or convictions are to be corrected. *Davis v. Smith*, 7 Ga. App. 192, 66 S.E. 401 (1909); *Harrell v. Avera*, 139 Ga. 340, 77 S.E. 160 (1913).

Habeas corpus cannot be substituted for writ of error (see now O.C.G.A. §§ 5-6-49 and 5-6-50). *Jackson v. Lowry*, 170 Ga. 755, 154 S.E. 228 (1930).

Habeas corpus cannot be used as a substitute for appeal, writ of error (see now O.C.G.A. §§ 5-6-49 and 5-6-50), or other remedial procedure. *Shiflett v. Dobson*, 180 Ga. 23, 177 S.E. 681 (1934); *Riley v. Garrett*, 219 Ga. 345, 133 S.E.2d 367 (1963).

Writ of habeas corpus cannot be used as a substitute for a writ of error (see now O.C.G.A. §§ 5-6-49 and 5-6-50), or other remedial procedure to correct errors of law, of which the defendant has had opportunity to avail oneself. *Moore v. Burnett*, 215 Ga. 146, 109 S.E.2d 605

(1959); *Smith v. Balkcom*, 217 Ga. 51, 120 S.E.2d 617 (1961).

Writ of habeas corpus cannot be substituted for a motion for new trial, writ of error, or other remedial procedure, or be used as a remedy for the review of alleged errors in the trial court. *Coates v. Balkcom*, 216 Ga. 564, 118 S.E.2d 376 (1961).

Habeas corpus cannot be used as a substitute for appeal, writ of error (see now O.C.G.A. §§ 5-6-49 and 5-6-50), or other remedial procedure for the correction of errors or irregularities alleged to have been committed by a trial court. *Grimes v. Harvey*, 219 Ga. 675, 135 S.E.2d 281 (1964).

Writ of habeas corpus is never a substitute for review to correct mere errors of law. *Moore v. Dutton*, 223 Ga. 585, 157 S.E.2d 267 (1967).

**Writ of habeas corpus cannot be properly employed as substitute for motion to withdraw guilty plea.** — Writ of habeas corpus cannot be properly employed as a substitute for a motion to withdraw a plea of guilty improperly entered. *Dean v. Balkcom*, 214 Ga. 222, 104 S.E.2d 126 (1958).

**Habeas court cannot direct trial date.** — It is beyond the authority of the habeas court to direct that the defendant be retried by the trial court within a certain period of time. *State v. Hernandez-Cuevas*, 202 Ga. App. 861, 415 S.E.2d 713 (1992).

**Defendant not entitled to release when bench warrant issued.** — When judge of city court presided in superior court, the verdict and judgment did not of themselves afford any cause for detaining in custody a person against whom the verdicts were rendered, but such person ought not to be discharged upon habeas corpus if imprisoned under a bench warrant originally issued against the person in the case, but should be held until lawfully tried upon the indictment. *Wells v. Newton*, 101 Ga. 141, 28 S.E. 640 (1897).



**In General (Cont'd)**

**Habeas not available remedy for valid imprisonment for contempt.** — When an individual is imprisoned by valid order of court for contempt, the imprisonment is not unlawful, and the remedy of the party to purge oneself of contempt is not by habeas corpus, but by application to the court by whose order the individual is in confinement. *Tolleson v. Greene*, 83 Ga. 499, 10 S.E. 120 (1889).

Habeas corpus is not an available remedy for direct contempt when no question of jurisdiction of the court is involved. *Hall v. Martin*, 177 Ga. 238, 170 S.E. 41 (1933).

When receiver has been adjudged in contempt and imprisoned for refusal to deliver property, the receiver will not be discharged under a writ of habeas corpus sued out before another judge on the ground that the receiver is unable by reason of poverty to comply with the order. *Tindall v. Westcott*, 113 Ga. 1114, 39 S.E. 450, 55 L.R.A. 225 (1901).

**Exhaustion of statutory remedies necessary to obtain release from commitment.** — When a person has been adjudged insane and committed to an institution and thereafter seeks to be discharged upon the ground that the person's sanity has been restored, the person cannot invoke a writ of habeas corpus without showing that the person has exhausted specific statutory remedies when such are provided; however, a party might perhaps show some valid reason excusing failure to pursue a statutory remedy. *Richardson v. Hall*, 199 Ga. 602, 34 S.E.2d 888 (1945).

When a person charged with a criminal offense filed a special plea of insanity and on such plea was found insane and committed, and after commitment left the hospital without permission and was later taken into custody by a sheriff for the purpose of being returned to such institution, the person could not maintain a petition for the writ of habeas corpus on the ground that the person had regained the person's sanity, without showing that the person had pursued or attempted to pursue the statutory method of obtaining release from the institution, or without alleging and proving some valid reason for the person's failure to invoke such remedy.

*Richardson v. Hall*, 199 Ga. 602, 34 S.E.2d 888 (1945).

**Unlawful arrest held insufficient cause for release.** — When a person accused of violating an ordinance was brought before a municipal court having jurisdiction and a formal charge was served on the person according to law, it was not sufficient cause for the person's release in advance of the time set for trial on writ of habeas corpus that the person's arrest was unlawful. *Holder v. Beavers*, 141 Ga. 217, 80 S.E. 715 (1914).

**Errors in commitment hearing.** — Writ of habeas corpus cannot bring into review alleged irregularities or errors of procedure before the committal court, or questions as to the sufficiency of the evidence upon which the applicant in the writ was committed. *Young v. Fain*, 121 Ga. 737, 49 S.E. 731 (1905).

Writ of habeas corpus cannot be employed to correct errors or irregularities in commitment hearing before justice of the peace, but the judgment committing the defendant must be absolutely void for habeas to issue. *Harris v. Norris*, 188 Ga. 610, 4 S.E.2d 840 (1939).

While it was the absolute duty of the justice of the peace to cause an abstract of all the evidence to be made and return the abstract to the superior court, failure of the justice to comply with such duty did not so vitiate the hearing and commitment as to render them absolutely void so as to authorize the grant of a writ of habeas corpus. *Harris v. Norris*, 188 Ga. 610, 4 S.E.2d 840 (1939).

**Bail trover.** — Proof by the defendant in bail trover of inability to produce the property sued for, on the return of a writ of habeas corpus issued at the defendant's instance, would not authorize the defendant's discharge. *Harris v. Bridges*, 57 Ga. 407, 24 Am. R. 495 (1876).

Defendant in bail trover could not procure discharge on habeas corpus sued out by the defendant or at the defendant's instance on the ground that the plaintiff had not met the plaintiff's legal obligations in respect to fees due or to become due the jailor. *Perry v. McLendon*, 62 Ga. 598 (1879).

**Refusal of writ held error.** — Refusal of writ of habeas was error when the



individual was arrested and committed to jail to answer before the superior court, but before being actually imprisoned, was carried before the county court, charged with the same offense, pled guilty, was fined, and after a third party agreed to pay the fine, was discharged, but afterwards placed in jail when the third party failed to pay the fine. *Williams v. Mize*, 72 Ga. 129 (1883); *Howard v. Tucker*, 12 Ga. App. 353, 77 S.E. 191 (1913).

**Refusal of writ upheld.** — When one refusing to work the public roads was fined and in default of payment imprisoned, such imprisonment was lawful and there was no error in refusing to discharge the petitioner under the writ of habeas corpus. *Singleton v. Holmes*, 70 Ga. 407 (1883).

Defendant held not entitled to habeas on ground that revocation of order releasing the defendant was void. *Aldredge v. Potts*, 187 Ga. 290, 200 S.E. 113 (1938).

Refusal on hearing of a writ of habeas corpus to discharge the applicant, held under an extradition warrant as a fugitive from justice for allegedly violating parole, held not error. *Broyles v. Mount*, 197 Ga. 659, 30 S.E.2d 48 (1944).

Allegations in petition for habeas corpus that order of revocation under attack was premature in that the probationer was entitled to a jury trial on the question of whether or not the probationer had committed the offense alleged to have been committed in violation of the terms of the probationer's probation prior to revocation, that three days' notice of revocation hearing was not sufficient or adequate notice, that the probationer had been acquitted by a jury, subsequent to the order of revocation, of the offense alleged to have constituted the probation violation, and that the evidence on the hearing was insufficient to sustain the exercise of the judge's discretion in revoking probation were insufficient to sustain the prisoner's discharge under the writ in that such allegations failed to show that the judgment of revocation was void, which is requisite to such relief. *Balkcom v. Parris*, 215 Ga. 123, 109 S.E.2d 48 (1959).

Dismissal of an inmate's habeas petition without a hearing was proper as the

petition failed to state any viable claim for pre-conviction habeas corpus relief since: (1) the inmate was not entitled to appointed counsel in the habeas corpus proceeding; (2) the habeas court was not required to make a determination of the inmate's mental state as it was an issue to be addressed in the context of the criminal prosecution; and (3) the inmate did not seek issuance of the writ on the ground that the inmate had tendered proper bail in connection with the inmate's then-pending prosecution on the criminal charge. *Britt v. Conway*, 281 Ga. 189, 637 S.E.2d 43 (2006).

Prisoner awaiting trial was not entitled to writ of habeas corpus under O.C.G.A. § 9-14-16 because the prisoner did not seek habeas relief on the ground that the case was one in which bail was allowed and when proper bail had been tendered; thus, it was not error to dismiss the habeas application without a hearing. *Britt v. Conway*, 283 Ga. 474, 660 S.E.2d 526 (2008).

**Rearrest unlawful after discharge on habeas.** — When a person has been discharged by a commissioner on a writ of habeas corpus, the sheriff has no authority to rearrest and imprison the person upon the same sentence upon which the person was imprisoned the first time and such rearrest is unlawful. *Sanders v. McHan*, 206 Ga. 155, 56 S.E.2d 281 (1949).

**Cited** in *Smith v. McLendon*, 59 Ga. 523 (1877); *Smith v. Milton*, 149 Ga. 28, 98 S.E. 607 (1919); *Jackson v. Lowry*, 170 Ga. 755, 154 S.E. 228 (1930); *Sanders v. Paschal*, 186 Ga. 837, 199 S.E. 153 (1938); *Rhodes v. Pearce*, 189 Ga. 623, 7 S.E.2d 251 (1940); *Harris v. Whittle*, 190 Ga. 850, 10 S.E.2d 926 (1940); *Paulk v. Sexton*, 203 Ga. 82, 45 S.E.2d 768 (1947); *Johnson v. Plunkett*, 215 Ga. 353, 110 S.E.2d 745 (1959); *Gilbert v. Balkcom*, 217 Ga. 168, 121 S.E.2d 648 (1961); *Goodine v. Griffin*, 309 F. Supp. 590 (S.D. Ga. 1970); *Baez v. Lemacks*, 264 Ga. 808, 452 S.E.2d 491 (1994).

### Habeas after Conviction

**Writ of habeas corpus is appropriate remedy only when the court was without jurisdiction** in the premises, or



**Habeas after Conviction (Cont'd)**

when the court exceeded the court's jurisdiction in passing sentence by virtue of which the party is imprisoned, or when the defendant in the defendant's trial was denied due process of law. *Balkcom v. Parris*, 215 Ga. 123, 109 S.E.2d 48 (1959).

**Writ of habeas corpus is never allowable as a substitute for a writ of error** or other remedial procedure to correct errors in the trial of a criminal case, but is the appropriate remedy only when the court was without jurisdiction in the premises, or when the court exceeded the court's jurisdiction in passing the sentence by virtue of which the party is imprisoned, so that such sentence is not merely erroneous, but is absolutely void. *Harris v. Norris*, 188 Ga. 610, 4 S.E.2d 840 (1939).

**Void judgments or sentences.** — Habeas corpus proceeding brought by a person under sentence is the appropriate remedy only when the court is without jurisdiction in making the order, rendering the judgment, or passing sentence by virtue of which the party is imprisoned so that such order, judgment, or sentence is not merely erroneous, but is absolutely void. *Stewart v. Sanders*, 199 Ga. 497, 34 S.E.2d 649 (1945).

Discharge under writ of habeas corpus, after conviction, cannot be granted unless the judgment is absolutely void. *Jackson v. Houston*, 200 Ga. 399, 37 S.E.2d 399 (1946).

Habeas corpus is the appropriate remedy only when the court was without jurisdiction in the premises, or when the court exceeded the court's jurisdiction in making the order, rendering the judgment, or passing the sentence by virtue of which the party is imprisoned, so that such order, judgment, or sentence is not merely erroneous, but is absolutely void. *Coates v. Balkcom*, 216 Ga. 564, 118 S.E.2d 376 (1961); *Grimes v. Harvey*, 219 Ga. 675, 135 S.E.2d 281 (1964).

**Judgment must be absolutely void.** — Discharge under a writ of habeas corpus after conviction cannot be granted unless judgment is absolutely void as when the convicting court was without jurisdiction, or when the defendant in the

defendant's trial was denied due process of law in violation of the Constitution. *Aldredge v. Williams*, 188 Ga. 607, 4 S.E.2d 469 (1939), cert. denied, 309 U.S. 661, 60 S. Ct. 512, 84 L. Ed. 1009 (1940); *Stroup v. Mount*, 197 Ga. 804, 30 S.E.2d 477 (1944).

Discharge under a writ of habeas corpus, after a plea of guilty by one accused of a crime, cannot be granted except in cases when the judgment is absolutely void for the reason that the function of the writ in criminal cases is not to test the truth of any fact essential to the establishment of guilt, but only to discharge one convicted of a crime when the judgment is wholly void. *Dean v. Balkcom*, 214 Ga. 222, 104 S.E.2d 126 (1958).

Rule that habeas corpus is not a substitute for a writ of error (see now O.C.G.A. §§ 5-6-49 and 5-6-50) means that habeas corpus will not lie to correct voidable judgments, that is, judgments which are merely erroneous, but will lie to secure release from detention under a judgment which is utterly void. *Riley v. Garrett*, 219 Ga. 345, 133 S.E.2d 367 (1963).

**Habeas corpus is an available remedy to attack a void judgment.** *Sims v. Balkcom*, 220 Ga. 7, 136 S.E.2d 766 (1964); *Balkcom v. Roberts*, 221 Ga. 339, 144 S.E.2d 524 (1965).

**Questions as to guilt, innocence, or irregularities not considered absent void judgment.** — Since writ of habeas cannot be used merely as a substitute for a writ of error or other remedial procedure to correct errors of law of which the defendant had an opportunity to avail oneself, no question as to guilt or innocence or as to any irregularity can be so raised, unless it was such as to render the judgment wholly void. *Aldredge v. Williams*, 188 Ga. 607, 4 S.E.2d 469 (1939), cert. denied, 309 U.S. 661, 60 S. Ct. 512, 84 L. Ed. 1009 (1940); *Stroup v. Mount*, 197 Ga. 804, 30 S.E.2d 477 (1944).

No question as to any irregularity can be raised by writ of habeas corpus, unless it is such as would render the judgment wholly void. *Smith v. Balkcom*, 217 Ga. 51, 120 S.E.2d 617 (1961).

**Conviction not void when day in court had.** — Habeas is proper to attack a void conviction, but a conviction is not



void if the defendant has had the defendant's day in court. *Davis v. Smith*, 7 Ga. App. 192, 66 S.E. 401 (1909); *Harrell v. Avera*, 139 Ga. 340, 77 S.E. 160 (1913).

**Writ not a substitute for other remedial procedures.** — Writ of habeas corpus, sought by one convicted of crime who seeks thereby to obtain one's liberty, can be maintained only for defects such as render judgment of conviction void, and cannot be made a substitute for a writ of error (see now O.C.G.A. §§ 5-6-49 and 5-6-50) or other remedial procedure for the correction of errors and irregularities. *Wilcoxon v. Aldredge*, 192 Ga. 634, 15 S.E.2d 873 (1941), later appeal, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

Habeas corpus is never a substitute for a writ of error or other remedial procedure to correct errors in the trial of a criminal case. *Stroup v. Mount*, 197 Ga. 804, 30 S.E.2d 477 (1944).

Writ of habeas corpus cannot be used as a substitute for appeal, writ of certiorari, writ of error (see now O.C.G.A. §§ 5-6-49 and 5-6-50), or other remedial procedure for the correction of errors of law of which the defendant had opportunity to avail oneself, nor can it be used as a second appeal or writ of error for such purpose. *Hodges v. Balkcom*, 209 Ga. 856, 76 S.E.2d 798 (1953).

When a person charged with a criminal offense has been sentenced by a court having jurisdiction of one's person and of the offense, habeas corpus cannot be used as a substitute for appeal, writ of error, or other remedial procedure for the correction of errors. *Plocar v. Foster*, 211 Ga. 153, 84 S.E.2d 360 (1954), cert. denied, 349 U.S. 962, 75 S. Ct. 893, 99 L. Ed. 1284 (1955).

When one has been convicted of a crime, habeas corpus cannot be used as a substitute for appeal or other remedial procedure for the correction of errors and irregularities, nor can it be used as a second appeal for such purpose. *Ferguson v. Balkcom*, 222 Ga. 676, 151 S.E.2d 707 (1966), rev'd on other grounds sub nom. *Ferguson v. Georgia*, 365 U.S. 570, 81 S. Ct. 756, 5 L. Ed. 2d 783 (1961), cert. denied, 375 U.S. 913, 84 S. Ct. 210, 11 L. Ed. 2d 152 (1963).

Writ of habeas corpus is never a substitute for a review to correct mere errors of law. *Sims v. Balkcom*, 220 Ga. 7, 136 S.E.2d 766 (1964).

**Waiver of issues not raised at trial.** — Petitioner cannot complain, in a petition for habeas corpus, of matters to which the petitioner should have excepted at trial. *McFarland v. Donaldson*, 115 Ga. 567, 41 S.E. 1000 (1902).

**Defense of former jeopardy** should be interposed on arraignment; and when this is not done, the defendant cannot, subsequent to conviction, set up this constitutional inhibition by habeas corpus. *Yeates v. Roberson*, 4 Ga. App. 573, 62 S.E. 104 (1908). See also *Holder v. Beavers*, 141 Ga. 217, 80 S.E. 715 (1914).

Applicant is not at liberty to prove, by way of habeas, that confession was involuntary when the issue was not raised at trial. *Wilcoxon v. Aldredge*, 192 Ga. 634, 15 S.E.2d 873 (1941), later appeal, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

Objection on the grounds of systematic racial exclusion involving a grand jury should have been presented in a proper way at trial, and upon failure to do so is considered waived and hence does not present a ground for habeas corpus. *Wilcoxon v. Aldredge*, 192 Ga. 634, 15 S.E.2d 873 (1941), later appeal, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

Complaint that confession introduced at trial was obtained by duress did not present a good ground for habeas corpus for the reason that such objection should have been made at trial, and upon failure to do so, it was considered waived. *Booth v. Aderhold*, 199 Ga. 655, 34 S.E.2d 869 (1945).

Objections to accusation under which petitioner pleaded nolo contendere and was sentenced, on ground that the accusation was void and did not charge defendant with any offense, could have been raised at trial and were not jurisdictional. *Plocar v. Foster*, 211 Ga. 153, 84 S.E.2d 360 (1954), cert. denied, 349 U.S. 962, 75 S. Ct. 893, 99 L. Ed. 1284 (1955).

**Issue decided at trial res judicata.** — While one indicted and tried under an



**Habeas after Conviction (Cont'd)**

unconstitutional statute may, even after final conviction, obtain discharge from custody on a writ of habeas corpus, when the accused, at trial, brings into question the validity of the statute under which one has been indicted, and the point is decided against the person, it then becomes *res adjudicata*, and cannot be reviewed collaterally on habeas corpus. *Moore v. Burnett*, 215 Ga. 146, 109 S.E.2d 605 (1959).

When the petitioner, by general demurrer, attacked the constitutionality of an ordinance under which the petitioner was convicted in the recorder's court, which ruling thereon was adverse to the petitioner, and thereafter voluntarily dismissed the petition for certiorari therefrom in the superior court, the question of the constitutionality of the ordinance became *res adjudicata* and could not thereafter be reviewed collaterally by habeas corpus. *Moore v. Burnett*, 215 Ga. 146, 109 S.E.2d 605 (1959).

**Judgment confirmed on appeal not subject to attack on habeas except for lack of jurisdiction.** — When a judgment has been confirmed by the Supreme Court on writ of error (see now O.C.G.A. §§ 5-6-49 and 5-6-50), the legality of the conviction cannot be drawn into question by habeas corpus, save for want of jurisdiction appearing on the face of the record. *Daniels v. Towers*, 79 Ga. 785, 7 S.E. 120 (1887).

**Writ not available to attack only one of two counts of conviction.** — Habeas corpus is not an available remedy to state prisoner under a valid judgment of conviction under first count of a two-count indictment, even though the judgment of conviction under count two is void. *Riley v. Garrett*, 219 Ga. 345, 133 S.E.2d 367 (1963).

**Writ not available on four of seven sentences.** — When four of the seven sentences were binding upon the petitioner and had not been served out, the petitioner could not be discharged upon a writ of habeas corpus even though three remaining sentences were unwarranted by law and void. *Brady v. Joiner*, 101 Ga. 190, 28 S.E. 679 (1897).

**Habeas held proper.** — When there is a general law punishing the carrying of

certain concealed weapons and a city ordinance prohibits under the same penalties each of several distinct and separate acts, some of which are within the corporate power to punish and some are not, due to the general law, plea of guilty to an accusation which merely charges generally a violation of the ordinance, without specifying any act whatever, cannot be applied to one class of the acts embraced in the ordinances rather than the other; hence, a judgment of conviction was void and the petitioner should be discharged on a writ of habeas corpus. *Collins v. Hall*, 92 Ga. 411, 17 S.E. 622 (1893).

When mere usurper was acting as mayor and sentenced the accused, habeas properly issued. *Stroup v. Pruden*, 104 Ga. 721, 30 S.E. 948 (1898).

One indicted, convicted, and sentenced under a repealed statute may be discharged by habeas corpus if at trial the question of the validity of such statute was not made and adjudicated against the person. *Griffin v. Eaves*, 114 Ga. 65, 39 S.E. 913 (1901).

Habeas corpus properly issued when indictment was void and no question as to the indictment's validity was adjudicated at trial. *McDonald v. State*, 126 Ga. 536, 55 S.E. 235 (1906).

Deprivation of counsel is such a fundamental and radical error that it operates to render trial illegal and void, and denial of benefit of counsel constitutes a ground for issuance of a writ of habeas corpus. *Wilcoxon v. Aldredge*, 192 Ga. 634, 15 S.E.2d 873 (1941), later appeal, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

When prisoner contends that the prisoner has executed the sentence imposed, habeas corpus is a proper remedy to call into question the prisoner's restraint. *Goble v. Reese*, 214 Ga. 697, 107 S.E.2d 175 (1959).

Person who is held in custody by reason of conviction under an accusation which fails to charge an offense against the laws of this state may secure the person's release by habeas corpus. *McCain v. Smith*, 221 Ga. 353, 144 S.E.2d 522 (1965).

**Refusal of habeas held proper.** — Writ of habeas corpus would not be allowed on grounds of illegal conviction af-



ter an individual was convicted of keeping a bar open on Sunday in violation of a city ordinance, even though there was a general law to the same effect, since the legislature had passed a local statute allowing the city council to pass all ordinances in relation to keeping open tippling houses on Sunday in the city. *Hood v. Von Glahn*, 88 Ga. 405, 14 S.E. 564 (1892).

When verdict of the jury found petitioner guilty of vagrancy, even if sentence was improperly passed upon the petitioner without affording the petitioner an opportunity to give bond for future good behavior, the petitioner would not be entitled to be discharged on a writ of habeas corpus, but would be held in custody for proper sentence. *Coleman v. Nelms*, 119 Ga. 307, 46 S.E. 451 (1904).

Fact that certain members of the grand jury who returned a bill of indictment under which the accused was tried and convicted had served at the previous term of the court was no reason for allowing the writ. *Phillips v. Brown*, 122 Ga. 571, 50 S.E. 361 (1905).

When sentence is lawful and not unauthorized by law, writ of habeas corpus will be denied. *Flagg v. Sisson*, 125 Ga. 277, 54 S.E. 171 (1906); *Lyons v. Collier*, 125 Ga. 231, 54 S.E. 183 (1906); *Harper v. Terry*, 139 Ga. 763, 78 S.E. 175 (1913).

Retention of petitioner in habeas corpus proceeding under authority of city officials for the purpose of carrying into execution the judgment of the mayor was not unauthorized by law and the defendants were not, for any reason assigned, entitled to discharge. *Shuler v. Willis*, 126 Ga. 73, 54 S.E. 965 (1906).

Writ of habeas was properly refused when the applicant was sentenced, but subsequently the judge instructed the sheriff to release the applicant and not enforce the sentence if the applicant stayed out of the Western Circuit, the judge stating at the same time that if the applicant came back in the circuit the sentence would no longer be suspended, and before the expiration of the sentence, the applicant reappeared in the circuit and was arrested upon written order of the judge. *O'Dwyer v. Kelly*, 133 Ga. 824, 67 S.E. 106 (1910).

Allegation that conviction was not war-

ranted under the evidence does not furnish a reason for discharging a person convicted upon a writ of habeas corpus. *Hicks v. Hamrick*, 144 Ga. 403, 87 S.E. 415 (1915).

**Error in verdict held no cause for writ.** *Naylor v. Dixon*, 145 Ga. 833, 90 S.E. 74 (1916).

Complaint that confession introduced at trial was obtained by duress did not present a good ground for habeas corpus for the reason that such an objection should have been properly made at the trial and upon failure to do so was considered waived. *Stroup v. Mount*, 197 Ga. 804, 30 S.E.2d 477 (1944).

When court had jurisdiction of the offense and the offender, the sufficiency of the accusation or of the acts therein set forth to constitute a crime cannot be considered on habeas corpus. *Plocar v. Foster*, 211 Ga. 153, 84 S.E.2d 360 (1954), cert. denied, 349 U.S. 962, 75 S. Ct. 893, 99 L. Ed. 1284 (1955).

In habeas corpus proceedings when the record is silent on the question of whether the defendant had counsel, was furnished with a list of witnesses, and was notified of the nature of the offense charged against the defendant, it will be presumed that whatever ought to have been done in the trial court was rightly done. *Plocar v. Foster*, 211 Ga. 153, 84 S.E.2d 360 (1954), cert. denied, 349 U.S. 962, 75 S. Ct. 893, 99 L. Ed. 1284 (1955).

Petition for habeas corpus which fails to allege that the petitioner is being held under a void judgment and fails to make any attack upon such judgment, but simply alleges facts which the petitioner contends show a conspiracy on the part of certain individuals to prevent the petitioner being heard in superior court on a motion to withdraw the petitioner's plea of guilty, which the petitioner contends the petitioner entered improperly, fails to set forth any legal basis for issuance of the writ. *Dean v. Balkcom*, 214 Ga. 222, 104 S.E.2d 126 (1958).

Record showing that petitioner was being held under valid, unexpired sentences which were not contested showed that the petitioner's detention was not unlawful and release on habeas corpus was not authorized. *Balkcom v. Chastain*, 220 Ga. 265, 138 S.E.2d 319 (1964).



**Habeas after Conviction (Cont'd)**

When there was no testimony to show that lack of counsel at a commitment hearing in any way prejudiced the petitioner at trial wherein the petitioner's appointed counsel entered a plea of guilty and the petitioner was sentenced to life imprisonment, it was error to release the petitioner for lack of counsel at the commitment hearing. *Smith v. Fuller*, 223 Ga. 673, 157 S.E.2d 447 (1967).

**Refusal of Supreme Court to review adverse ruling not within purview of habeas.** — Claim of illegal detention in refusal by Supreme Court to review adverse ruling on a motion for new trial because of improper preparation of a brief of evidence on a previous appeal was not within the purview of habeas corpus. *Coates v. Balkcom*, 216 Ga. 564, 118 S.E.2d 376 (1961).

**Remand to respondent held only authorized disposition under circumstances.** — When it is unquestioned that detention of the petitioner under sentences from other counties is legal, the trial judge has no authority to make any other disposition of the writ of habeas corpus except to remand the petitioner to the custody of the respondent. *Balkcom v. Hurst*, 220 Ga. 405, 139 S.E.2d 306 (1964).

**Judge without authority to direct crediting of time on future sentence.** — Trial judge in habeas corpus proceeding was without authority to direct that the applicant be given credit for time served on sentences involved upon any sentence which might be imposed in the event of conviction for either or both of the offenses for which the applicant was previously sentenced and the applicant's effort to do so was a nullity. *Balkcom v. Williams*, 220 Ga. 359, 138 S.E.2d 873 (1964).

**RESEARCH REFERENCES**

**ALR.** — Habeas corpus to test constitutionality of ordinance under which petitioner is held, 32 ALR 1054.

Power to grant writ of habeas corpus pending appeal from conviction, 52 ALR 876.

Discharge on habeas corpus in federal court from custody under process of state court for acts done under federal authority, 65 ALR 733.

Illegal or erroneous sentence as ground for habeas corpus, 76 ALR 468.

Bar of limitations as proper subject of investigation in extradition proceedings or in habeas corpus proceedings for release of one sought to be extradited, 77 ALR 902.

Disqualification of judge who presided at trial or of juror as ground of habeas corpus, 124 ALR 1079.

When is a person in custody of governmental authorities for purpose of exercise of state remedy of habeas corpus — modern cases, 26 ALR4th 455.

**9-14-17. Discharge for defect in affidavit, warrant, or commitment.**

If the person in question is detained upon a criminal charge and it appears to the court that there is probable cause for his detention, he shall not be discharged for any defect in the affidavit, warrant, or commitment until a reasonable time has been given to the prosecutor to remedy the defect by a new proceeding. (Laws 1808, Cobb's 1851 Digest, p. 856; Code 1863, § 3926; Code 1868, § 3949; Code 1873, § 4025; Code 1882, § 4025; Penal Code 1895, § 1227; Penal Code 1910, § 1308; Code 1933, § 50-117.)



## JUDICIAL DECISIONS

**Editor's notes.** — Article 2 of this chapter now provides the exclusive procedure for seeking a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence of a state court of record, expanding the scope of habeas in such cases. See O.C.G.A. §§ 9-14-40 and 9-14-41.

**Commitment must be void to authorize habeas.** — Writ of habeas corpus cannot be employed to correct errors or irregularities in commitment hearing before justice of the peace but the judgment committing the defendant must be absolutely void for the writ to issue. *Harris v. Norris*, 188 Ga. 610, 4 S.E.2d 840 (1939).

**Failure to return abstract of evi-**

**dence to superior court.** — While it was the absolute duty of the justice of the peace to cause an abstract of all the evidence to be made and return the abstract to the superior court, failure to comply with such duty did not so vitiate the hearing and commitment as to render them absolutely void so as to authorize the grant of a writ of habeas corpus. *Harris v. Norris*, 188 Ga. 610, 4 S.E.2d 840 (1939).

**Cited** in *Rhodes v. Pearce*, 189 Ga. 623, 7 S.E.2d 251 (1940); *Stynchcombe v. Hardy*, 228 Ga. 130, 184 S.E.2d 356 (1971); *Treadaway v. Baker*, 241 Ga. 95, 243 S.E.2d 41 (1978); *Treadaway v. Baker*, 243 Ga. 354, 254 S.E.2d 327 (1979).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, §§ 33, 102, 156, 164.

**C.J.S.** — 39A C.J.S., Habeas Corpus, § 337.

**ALR.** — Discharge on habeas corpus in federal court from custody under process

of state court for acts done under federal authority, 65 ALR 733.

Illegal or erroneous sentence as ground for habeas corpus, 76 ALR 468.

Discharge on habeas corpus after conviction as affecting claim or plea of former jeopardy, 97 ALR 160.

## 9-14-18. Discharge after arrest for offense committed in another state.

If a person is arrested on suspicion of the commission of an offense in another state and the suspicion is reasonable, the person shall not be discharged until a sufficient time has been given for a demand to be made on the Governor for his rendition. (Orig. Code 1863, § 3926; Code 1868, § 3949; Code 1873, § 4025; Code 1882, § 4025; Penal Code 1895, § 1228; Penal Code 1910, § 1309; Code 1933, § 50-118.)

## JUDICIAL DECISIONS

**Editor's notes.** — Article 2 of this chapter now provides the exclusive procedure for seeking a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence of a state court of record, expanding the scope of habeas in such cases. See O.C.G.A. §§ 9-14-40 and 9-14-41.

**Court in asylum state has three issues before the court in examining**

**extradition by way of habeas corpus:**

(1) whether a crime has been properly charged in the demanding state; (2) whether the fugitive in custody is the person so charged; and (3) whether the fugitive was in the demanding state at the time the crime alleged was committed. *Collins v. Stynchcombe*, 226 Ga. 776, 177 S.E.2d 682 (1970).

**Constitutionality of incarceration**



**not considered on habeas case involving extradition.** — It is fundamental to the federal system that neither the courts of the asylum state nor federal courts sitting in that state will seek to determine the constitutionality of incarceration in the demanding state from which a fugitive has fled. *Collins v. Stynchcombe*, 226 Ga. 776, 77 S.E.2d 682 (1970).

**Absence from state no defense to extradition.** — Lack of presence in demanding state at the time of the commission of an alleged crime is no longer a defense which is cognizable in a habeas corpus extradition proceeding. *Hooten v. State*, 245 Ga. 250, 264 S.E.2d 192, cert. denied, 446 U.S. 942, 100 S. Ct. 2168, 64 L. Ed. 2d 797 (1980).

**Warrant of a governor in extradition is prima facie evidence** of the existence of every fact of a crime necessary for its issuance. *Sellers v. Griffin*, 226 Ga. 565, 176 S.E.2d 75 (1970).

**Burden of petitioner held for extra-**

**dition.** — When, on trial of a habeas corpus case, it appears that the respondent holds the petitioner in custody under an executive warrant based upon an extradition proceeding, and the warrant is regular on the warrant's face, the burden is cast upon the petitioner to show some valid and sufficient reason why the warrant should not be executed since there is a presumption that the governor has complied with the Constitution and the law and this presumption continues until the contrary appears. *King v. Mount*, 196 Ga. 461, 26 S.E.2d 419 (1943); *Baldwin v. Grimes*, 216 Ga. 390, 116 S.E.2d 207 (1960).

Person held upon a governor's warrant in an extradition proceeding who is seeking to be released on a habeas corpus writ must introduce evidence sufficient to overcome the prima facie case on the issue for which the person is being prosecuted in the demanding state. *Sellers v. Griffin*, 226 Ga. 565, 176 S.E.2d 75 (1970).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus, §§ 85 et seq., 88 et seq.

**C.J.S.** — 39 C.J.S., Habeas Corpus, § 237 et seq.

**ALR.** — Right of one arrested on extradition warrant to delay to enable him to present evidence that he is not subject to extradition, 11 ALR 1410.

One charged with desertion or failure to support wife or child as fugitive from justice, subject to extradition, 32 ALR 1167; 54 ALR 281.

Right to prove absence from demanding state or alibi on habeas corpus in extradition proceedings, 51 ALR 797; 61 ALR 715.

Extradition of escaped or paroled convict, or one at liberty on bail, 78 ALR 419.

Determination in extradition proceedings, or on habeas corpus in such proceedings, whether a crime is charged, 81 ALR 552; 40 ALR2d 1151.

Sufficiency of recitals in rendition warrant in extradition as regards copy of indictment or affidavit, 89 ALR 595.

Discharge on habeas corpus of one held in extradition proceedings as precluding subsequent extradition proceedings, 33 ALR3d 1443.

## 9-14-19. Powers of court in cases not covered by Code Sections 9-14-16 through 9-14-18.

In cases other than those specified in Code Sections 9-14-16, 9-14-17, and 9-14-18, the judge hearing the return shall discharge, remand, or admit the person in question to bail or shall deliver him to the custody of the officer or person entitled thereto, as the principles of law and justice may require. (Orig. Code 1863, § 3927; Code 1868, § 3950; Code 1873, § 4026; Code 1882, § 4026; Penal Code 1895, § 1229; Penal Code 1910, § 1310; Code 1933, § 50-119.)



## JUDICIAL DECISIONS

**Editor's notes.** — Article 2 of this chapter now provides the exclusive procedure for seeking a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence of a state court of record, expanding the scope of habeas in such cases. See O.C.G.A. §§ 9-14-40 and 9-14-41.

**Return to writ of habeas corpus is to be heard by judge** granting the writ not by jury. *Sumner v. Sumner*, 117 Ga. 229, 43 S.E. 485 (1903).

**Duty of court in habeas proceeding.** — In habeas corpus proceeding, duty of the court is not necessarily to discharge one illegally restrained, but to determine whether at the time of the hearing the ends of justice require that such person be committed to the proper custody. *Lowe v. Taylor*, 180 Ga. 654, 180 S.E. 223 (1935).

**Investigation of whether law and justice require release intended.** — It is the plain intent of the law of this state that upon the hearing of a writ of habeas corpus, the investigation is not concerned with whether original confinement was illegal but whether or not the principles of law and justice require at the time of the hearing that a person be released. *Lowe v. Taylor*, 180 Ga. 654, 180 S.E. 223 (1935).

**Release of convict on private chain gang.** — Convicts may not be worked on private chain gangs controlled by private individuals and a convict confined on such a chain gang should be released from the individuals controlling the chain gang and remanded to the custody of the authorities. *Simmons v. Georgia Iron & Coal Co.*, 117 Ga. 305, 43 S.E. 780, 61 L.R.A. 739 (1903). See also *Russell v. Tatum*, 104 Ga. 332, 30 S.E. 812 (1898).

**Release of involuntary detainee.** — Trial court did not exceed the court's authority by granting a writ of habeas corpus, pursuant to O.C.G.A. § 9-14-19, to an involuntary detainee who had been committed to a state hospital upon a finding of not guilty by reason of insanity in the deaths of the detainee's grandparents and ordering that the state hospital officials prepare a plan for supervision and outpatient services upon the detainee's release; the detainee was entitled to seek relief by that route, pursuant to O.C.G.A. § 37-3-148(a), or by seeking a release petition pursuant to O.C.G.A. § 17-7-131(f). *Hogan v. Nagel*, 276 Ga. 197, 576 S.E.2d 873 (2003).

**Cited** in *Beavers v. Williams*, 199 Ga. 114, 33 S.E.2d 343 (1945); *Tompkins v. Hall*, 291 Ga. 224, 728 S.E.2d 621 (2012).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, § 163.

**C.J.S.** — 39A C.J.S., Habeas Corpus, § 368 et seq.

## 9-14-20. Recordation of proceedings by clerk of court; fees.

In all habeas corpus cases, the proceedings shall be returned to the clerk of the superior court of the county the judge of which heard the same or to the probate court if the case was heard by the judge of the probate court and shall be recorded by such officer as are other cases. For such services, the officer shall receive the fees provided by Code Section 15-6-77. (Orig. Code 1863, § 3930; Code 1868, § 3953; Code 1873, § 4029; Code 1882, § 4029; Penal Code 1895, § 1232; Penal Code 1910, § 1313; Code 1933, § 50-124; Ga. L. 1970, p. 497, § 5.)



## JUDICIAL DECISIONS

**Editor's notes.** — Article 2 of this chapter now provides the exclusive procedure for seeking a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence of a state court of record, expanding the scope of habeas in such cases. See O.C.G.A. §§ 9-14-40 and 9-14-41.

**This section has reference to pleadings and orders in habeas corpus cases** and does not require the trial judge to order all habeas hearings to be reported and transcribed. *Hilliard v. Hilliard*, 243 Ga. 424, 254 S.E.2d 372 (1979).

**Failure to order hearing transcribed not error.** — Trial court did not err in failing to order hearing of habeas corpus proceeding, in which divorced father sought to regain custody of his son, transcribed. *Hilliard v. Hilliard*, 243 Ga. 424, 254 S.E.2d 372 (1979).

**Proceeding should be recorded in county where detention occurred.** *Simmons v. Georgia Iron & Coal Co.*, 117 Ga. 305, 43 S.E. 780, 61 L.R.A. 739 (1903).

## RESEARCH REFERENCES

**C.J.S.** — 39A C.J.S., Habeas Corpus, §§ 354, 355.

## 9-14-21. Costs of proceedings.

The judge hearing the return to a writ of habeas corpus may in his discretion award the costs of the proceeding against either party and may order execution to issue therefor by the clerk. (Orig. Code 1863, § 3929; Code 1868, § 3952; Code 1873, § 4028; Code 1882, § 4028; Penal Code 1895, § 1231; Penal Code 1910, § 1312; Code 1933, § 50-125.)

## JUDICIAL DECISIONS

**Meaning of "costs of the proceeding".** — Term "costs of the proceeding," as used in this section, embraces only charges fixed by statute as compensation for services rendered by officers of court in the progress of the habeas corpus cause and does not authorize the judge hearing

the return to the writ to award attorney's fees to the respondent. *Bell v. McNair*, 160 Ga. 853, 129 S.E. 94 (1925). See also *Davis v. State*, 33 Ga. 531 (1863).

**Cited in** *Harvey v. Harvey*, 244 Ga. 199, 259 S.E.2d 456 (1979).

## OPINIONS OF THE ATTORNEY GENERAL

**Payment of costs by Board of Offender Rehabilitation in habeas corpus cases brought against wardens** of various institutions should only be done upon compliance by the clerk of the taxing

court with the statutory provisions; such compliance is not established by the rendering of a statement of account. 1969 Op. Att'y Gen. No. 69-218.



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, § 167.

**C.J.S.** — 39A C.J.S., Habeas Corpus, §§ 377, 378.

**ALR.** — Costs in habeas corpus, 81 ALR 151.

### 9-14-22. Appeals; speedy hearing; transmittal of remittitur.

(a) Appeals in habeas corpus cases shall be governed, in all respects where applicable, by the laws in reference to appeals in other cases regarding the practice in the lower courts and in the Supreme Court relating to the time and manner of signing, filing, serving, transmitting, and hearing.

(b) It shall be the duty of the Supreme Court to give a speedy hearing and determination in habeas corpus cases either under existing rules or under special rules to be formulated by the court for such purpose.

(c) If the judgment of the court below is affirmed by the Supreme Court, the clerk of the Supreme Court shall promptly transmit the remittitur to the clerk of the court from which the appeal was taken. Upon the receipt of the remittitur, the clerk shall notify the judge of the court who shall have full power to pass an order, sentence, or judgment necessary to carry into execution the judgment of the court. (Ga. L. 1897, p. 53, § 1; Penal Code 1910, § 1316; Code 1933, § 50-126; Ga. L. 1946, p. 726, § 1.)

**Cross references.** — Certification and transmittal of transcript and record, Rules of the Supreme Court of the State of Georgia, Rule 15. Granting of application where there is arguable merit, Rules of

the Supreme Court of the State of Georgia, Rule 26.

**Law reviews.** — For survey article on local government law, see 60 Mercer L. Rev. 263 (2008).

## JUDICIAL DECISIONS

**This section is applicable to a case involving detention of a minor.** *Weaver v. Thompson*, 11 Ga. App. 132, 74 S.E. 901 (1912).

**Review of judgments made by superior and probate courts.** — Judgments on habeas corpus are subject to review by writ of error (see now O.C.G.A. §§ 5-6-49 and 5-6-50) if rendered by the judge of the superior court and by certiorari if rendered by the judge of the probate court. *Perry v. McLendon*, 62 Ga. 598 (1879). See also *Livingston v. Livingston*, 24 Ga. 379 (1858).

**Appeal by custodians of prisoners.** — Writ of error (see now O.C.G.A. §§ 5-6-49 and 5-6-50) lies in favor of wardens, sheriffs, and other custodians of prisoners when it is sought by habeas corpus to release from custody prisoners held under criminal proceedings. *Davis v. Smith*, 7 Ga. App. 192, 66 S.E. 401 (1909).

**Appeal from municipal court conviction for violating ordinances.** — One restrained of liberty as a result of a municipal court conviction for violation of municipal ordinances is entitled to a direct appeal from a habeas court's final



order on a habeas petition because a municipal court presiding over the trial of such charges is not a state court of record; accordingly, a business operator who had been convicted in a municipal court for violating city ordinances governing permits and hours of operation was entitled to a direct appeal from a final order on a habeas petition. *Nguyen v. State*, 282 Ga. 483, 651 S.E.2d 681 (2007).

**Disposition of petitioner pending appeal of habeas corpus decision in extradition case.** — Filing of bill of exceptions (see now O.C.G.A. §§ 5-6-49 and 5-6-50) to decision of the judge in the hearing of a habeas corpus case, when the petitioner is being detained under an extradition warrant, does not operate as a supersedeas, and pending decision on appeal, the petitioner must remain in the condition in which the petitioner is placed by judgment of the lower court; in such a case there is no provision in the law for bail. *Hames v. Sturdivant*, 181 Ga. 472, 182 S.E. 601 (1935).

**Appeal not dismissed at expiration of time covered by sentence.** — When habeas corpus and writ of error (see now O.C.G.A. §§ 5-6-49 and 5-6-50) thereon are brought to free individual from imprisonment under a sentence alleged to have been illegal, a writ of error will not be dismissed on the ground that the period of time covered by the sentence has expired. *Lark v. State*, 55 Ga. 435 (1875).

**Custody awaiting probation revocation hearing.** — When the appellant filed a habeas petition while in custody in lieu of bond awaiting a probation revocation hearing, the appellant was authorized under O.C.G.A. § 9-14-22 to appeal directly the denial of habeas relief. *Smith v. Nichols*, 270 Ga. 550, 512 S.E.2d 279 (1999).

**Dismissal of appeal held proper when petitioner subsequently released on bond.** — When a writ of error (see now O.C.G.A. §§ 5-6-49 and 5-6-50) to order remanding petitioner to jail was sued out, the writ would be dismissed

since it appeared that, subsequent to the order complained of, the petitioner was indicted by the grand jury of the county for the same offense for which the petitioner had been committed, and upon giving bond had been released from custody. *Carter v. Gabrels*, 136 Ga. 177, 71 S.E. 3 (1911).

**Judgment of lower court not disturbed on review if supported by evidence.** — On habeas corpus proceeding, judge is the trier of law and facts and the judge's decision, if supported by any evidence, is not subject to review in the Supreme Court. *Grier v. Balkcom*, 213 Ga. 133, 97 S.E.2d 151 (1957).

**Jurisdiction of appeal of decisions of the habeas court.** — When a habeas court found the trial court had violated O.C.G.A. § 17-8-57 and that appellate counsel was ineffective for failing to raise the issue on appeal, it was error for the habeas court to order that the defendant was entitled to a new appeal since this action: (1) violated the rule that a criminal defendant was not entitled to a second appeal; (2) wasted judicial resources, as an appeal required the appellate court to engage in the same analysis the habeas court had just performed; and (3) created the possibility, realized in this case, that an appellate court would be presented with a matter outside of the court's jurisdiction as appeals of decisions of a habeas court were the sole province of the Georgia Supreme Court. *Milliken v. Stewart*, 276 Ga. 712, 583 S.E.2d 30 (2003).

**Cited in** *Broomhead v. Chisolm*, 47 Ga. 390 (1872); *Mansfield v. State*, 94 Ga. 74, 20 S.E. 249 (1894); *Thompson v. Thompson*, 124 Ga. 874, 53 S.E. 507 (1906); *Weaver v. Thompson*, 11 Ga. App. 132, 74 S.E. 901 (1912); *Richards v. McHan*, 139 Ga. 37, 76 S.E. 382 (1912); *Cooley v. Dixon*, 149 Ga. 506, 101 S.E. 181 (1919); *Warnock v. Burch*, 181 Ga. 586, 183 S.E. 563 (1936); *McClure v. Hopper*, 234 Ga. 45, 214 S.E.2d 503 (1975); *Gresham v. Edwards*, 281 Ga. 881, 644 S.E.2d 122 (2007).



RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, §§ 108, 169.  
**C.J.S.** — 39A C.J.S., Habeas Corpus, §§ 398, 401.  
**ALR.** — Right of state or public officer to appeal from an order in habeas corpus releasing one from custody, 30 ALR 1322.

Supersedeas, stay, or bail, upon appeal in habeas corpus, 63 ALR 1460; 143 ALR 1354.  
Right of extraditee to bail after issuance of governor’s warrant and pending final disposition of habeas corpus claim, 13 ALR5th 118.

9-14-23. Attachment for contempt for disobedience of writ.

Any person disregarding the writ of habeas corpus in any manner whatever shall be liable to attachment for contempt, issued by the judge granting the writ, under which attachment the person may be imprisoned until he complies with the legal requirements of the writ. (Orig. Code 1863, § 3923; Code 1868, § 3946; Code 1873, § 4022; Code 1882, § 4022; Penal Code 1895, § 1223; Penal Code 1910, § 1304; Code 1933, § 50-115.)

JUDICIAL DECISIONS

**Contempt order held authorized.** — After the father sent the child in dispute to his family in Pakistan, the trial court did not err in ordering confinement of the father until the child was returned as the trial court was authorized to find that the father had disobeyed, without defense, a legal requirement of a writ of habeas corpus. *Salim v. Salim*, 244 Ga. 513, 260 S.E.2d 894 (1979).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, § 174.  
**C.J.S.** — 39A C.J.S., Habeas Corpus, § 270.  
**ALR.** — Mistreatment of prisoner as contempt, 40 ALR 1278.  
Liability of judge, court, administrative officer, or other custodian of person for

whose release the writ is sought, in connection with habeas corpus proceedings, 84 ALR 807.  
Oral court order implementing prior written order or decree as independent basis of charge of contempt within contempt proceedings based on violation of written order, 100 ALR3d 889.

ARTICLE 2

PROCEDURE FOR PERSONS UNDER SENTENCE OF STATE COURT OF RECORD

**Law reviews.** — For article, “Federalism in Current Perspective,” see 1 Ga. L. Rev. 586 (1967). For article discussing Georgia’s habeas corpus statutes in light of federal courts’ requirements of exhaustion of state remedies prior to entertaining a habeas petition, see 9 Ga. St. B.J. 29 (1972). For article, “A New Role for an Ancient Writ: Post-Conviction Habeas Corpus Relief in Georgia,” see 8 Ga. L. Rev. 313 (1974). For article, “Providing Legal Services to Prisoners,” see 8 Ga. L.



Rev. 363 (1974). For article examining the background and passage of this article and suggesting several possible revisions, see 9 Ga. L. Rev. 13 (1974). For article discussing developments in Georgia criminal law in 1976 to 1977, see 29 Mercer L. Rev. 55 (1977). For article discussing history of post-conviction habeas corpus relief in this state, see 12 Ga. L. Rev. 249 (1978). For article discussing this state's long arm statute, prejudgment attachment, and habeas corpus, with respect to judicial developments in practice and pro-

cedure in the Fifth Circuit, see 30 Mercer L. Rev. 925 (1979).

For note surveying Georgia protection of the constitutional rights of criminal defendants through habeas corpus proceedings, see 16 Mercer L. Rev. 281 (1964). For note, "Discretionary Appointment of Counsel at Post-Conviction Proceedings: An Unconstitutional Barrier to Effective Post-Conviction Relief," see 8 Ga. L. Rev. 434 (1974). For note on 1995 amendments and enactments of sections in this article, see 12 Ga. St. U.L. Rev. 18 (1995).

### JUDICIAL DECISIONS

**Editor's notes.** — For cases concerning the general provisions as to habeas corpus, see the annotations following Article 1 of this chapter.

**Constitutionality of article.** — Ga. L. 1967, p. 835 is not unconstitutional as violating Ga. Const. 1945, Art. I, Sec. I, Para. IV (see now Ga. Const. 1983, Art. I, Sec. I, Para. XII) as denying the right to prosecute one's cause. *Reed v. Hopper*, 235 Ga. 298, 219 S.E.2d 409 (1975).

Ga. L. 1967, p. 835 does not violate Ga. Const. 1945, Art. I, Sec. I, Para. IV (see now Ga. Const. 1983, Art. I, Sec. I, Para. XV), providing that the writ of habeas corpus shall not be suspended. *Reed v. Hopper*, 235 Ga. 298, 219 S.E.2d 409 (1975).

**Post-conviction habeas not constitutionally required.** — This state is not constitutionally required to afford prisoners either direct appeals from criminal convictions or a procedure for petitioning for a writ of habeas corpus. *Gibson v. Jackson*, 443 F. Supp. 239 (M.D. Ga. 1977), vacated on other grounds, 578 F.2d 1045 (5th Cir. 1978), cert. denied, 439 U.S. 1119, 99 S. Ct. 1028, 59 L. Ed. 2d 79 (1979).

**Ga. L. 1967, p. 835 provides an adequate post-conviction remedy to a prisoner** seeking relief upon a claim arising from substantial denial of rights guaranteed by the federal and state Constitutions or by the laws of the state including denial of the right of appeal or of effective assistance of counsel on appeal. *Neal v. State*, 232 Ga. 96, 205 S.E.2d 284 (1974).

**Similarity of article to federal law.** — Except that it commits the power to the

court having territorial jurisdiction over the place of confinement, rather than vesting jurisdiction in the original sentencing court, Ga. L. 1967, p. 835 is remarkably like 28 U.S.C., § 2255. *Peters v. Rutledge*, 397 F.2d 731 (5th Cir. 1968).

**Scope of article.** — Ga. L. 1967, p. 835 deals only with habeas corpus cases when the prisoner is being restrained by virtue of a sentence of a state court of record. *Shelton v. Grimes*, 224 Ga. 451, 162 S.E.2d 426 (1968), cert. denied, 393 U.S. 1089, 89 S. Ct. 853, 21 L. Ed. 2d 782, rehearing denied, 394 U.S. 967, 89 S. Ct. 1301, 22 L. Ed. 2d 569 (1969).

**Application of Civil Practice Act (see now O.C.G.A. Ch. 11, T. 9) to article.** — Civil Practice Act applies to habeas corpus proceedings insofar as questions arise therein regarding the sufficiency of pleadings, the admissibility of evidence under the petition as drawn, amendments, and those other elements of pleading and practice enumerated in Ga. L. 1968, p. 1104, § 12 (see now O.C.G.A. § 9-11-81). *Johnson v. Caldwell*, 229 Ga. 548, 192 S.E.2d 900 (1972).

Legislature intended, in enacting the 1968 amendment to Ga. L. 1968, p. 1104, § 12 (see now O.C.G.A. § 9-11-81), to repeal pro tanto the provisions of Ga. L. 1967, p. 835 insofar as it prescribed any different rules governing the sufficiency of pleadings, amendments, and what evidence would be admissible in support of a claim of illegal imprisonment, and intended that thereafter the Civil Procedure Act (see now O.C.G.A. Ch. 11, T. 9) should apply. *Johnson v. Caldwell*, 229 Ga. 548, 192 S.E.2d 900 (1972).



**Habeas corpus is not an available remedy for recovery of a fine.** *Bunn v. Burden*, 237 Ga. 439, 228 S.E.2d 830 (1976).

**No right to appointed counsel.** — Petitioner in habeas corpus attacking illegality of the petitioner's detention pursuant to sentencing for a crime is not entitled to appointed counsel. *Reese v. Ault*, 229 Ga. 694, 194 S.E.2d 79 (1972). (See also annotations to Art. 1 of this chapter.).

**State habeas prerequisite to federal petition.** — Although Ga. L. 1967, p. 835 is technical and difficult of application, it is a procedure that prisoners of this state must utilize and complete before the prisoners can petition in a United States District Court for a writ of habeas corpus. *Gibson v. Jackson*, 443 F. Supp. 239 (M.D. Ga. 1977), vacated on other grounds, 578 F.2d 1045 (5th Cir. 1978), cert. denied, 439 U.S. 1119, 99 S. Ct. 1028, 59 L. Ed. 2d 79 (1979). But see *Davis v. Smith*, 430 F.2d 1256 (5th Cir. 1970), wherein federal court declined to require petitioner to appeal denial of habeas petition by superior court to Supreme Court.

**Improper application of state law by habeas court not ground for federal relief.** — One cannot state a federal claim for habeas relief by alleging that the state habeas court failed to properly apply state law. *Stewart v. Ricketts*, 451 F. Supp. 911 (M.D. Ga. 1978).

**Cited in** *Ramirez v. State*, 223 Ga. 815, 158 S.E.2d 238 (1967); *McGarrah v.*

*Dutton*, 381 F.2d 161 (5th Cir. 1967); *Tolever v. Smith*, 224 Ga. 270, 161 S.E.2d 266 (1968); *Henderson v. Dutton*, 397 F.2d 375 (5th Cir. 1968); *Rearden v. Smith*, 403 F.2d 773 (5th Cir. 1968); *Picklesimer v. Smith*, 405 F.2d 186 (5th Cir. 1968); *Montos v. Smith*, 406 F.2d 1243 (5th Cir. 1969); *Elkins v. Kelley*, 410 F.2d 734 (5th Cir. 1969); *O'Neal v. Smith*, 413 F.2d 269 (5th Cir. 1969); *Poss v. Smith*, 227 Ga. 43, 178 S.E.2d 859 (1970); *Moore v. Dutton*, 432 F.2d 1281 (5th Cir. 1970); *Johnson v. Smith*, 449 F.2d 127 (5th Cir. 1971); *Sneed v. Caldwell*, 229 Ga. 507, 192 S.E.2d 263 (1972); *Sims v. State*, 230 Ga. 589, 198 S.E.2d 298 (1973); *Whitlock v. State*, 230 Ga. 700, 198 S.E.2d 865 (1973); *Mosley v. Smith*, 470 F.2d 1320 (5th Cir. 1973); *Farmer v. Caldwell*, 476 F.2d 22 (5th Cir. 1973); *Riggins v. Stynchcombe*, 231 Ga. 589, 203 S.E.2d 208 (1974); *Ardister v. Hopper*, 500 F.2d 229 (5th Cir. 1974); *McClure v. Hopper*, 234 Ga. 45, 214 S.E.2d 503 (1975); *Fuller v. Ricketts*, 234 Ga. 104, 214 S.E.2d 541 (1975); *Samuels v. Hopper*, 234 Ga. 246, 215 S.E.2d 250 (1975); *Crowell v. State*, 234 Ga. 313, 215 S.E.2d 685 (1975); *Justice v. State Bd. of Pardons & Paroles*, 234 Ga. 749, 218 S.E.2d 45 (1975); *Mason v. Balcom*, 531 F.2d 717 (5th Cir. 1976); *Dixon v. Hopper*, 407 F. Supp. 58 (M.D. Ga. 1976); *Lumpkin v. Ricketts*, 551 F.2d 680 (5th Cir. 1977); *Chenault v. Stynchcombe*, 581 F.2d 444 (5th Cir. 1978).

## OPINIONS OF THE ATTORNEY GENERAL

**Article inapplicable to habeas of one committed for mental illness.** — Ga. L. 1967, p. 835 would be inapplicable to habeas corpus proceedings under former Code 1933, § 88-517, as it concerned

itself with the exclusive procedures for suing out a writ by one restrained by virtue of a "sentence" imposed by a state court of record. 1967 Op. Att'y Gen. No. 67-320.

## RESEARCH REFERENCES

**ALR.** — Power to grant writ of habeas corpus pending appeal from conviction, 52 ALR 876.

Discharge on habeas corpus in federal court from custody under process of state

court for acts done under federal authority, 65 ALR 733.

Discharge on habeas corpus after conviction as affecting claim or plea of former jeopardy, 97 ALR 160.



**9-14-40. Legislative intent.**

(a) The General Assembly finds that:

(1) Expansion of the scope of habeas corpus in federal court by decisions of the United States Supreme Court together with other decisions of the court substantially curtailing the doctrine of waiver of constitutional rights by an accused and limiting the requirement of exhaustion of state remedies to those currently available have resulted in an increasingly large number of convictions of the courts of this state being collaterally attacked by federal habeas corpus based upon issues and contentions not previously presented to or passed upon by courts of this state;

(2) The increased reliance upon federal courts tends to weaken state courts as instruments for the vindication of constitutional rights with a resultant deterioration of the federal system and federal-state relations; and

(3) To alleviate such problems, it is necessary that the scope of state habeas corpus be expanded and the state doctrine of waiver of rights be modified.

(b) The General Assembly further finds that expansion of state habeas corpus to include many sharply contested issues of a factual nature requires that only the superior courts have jurisdiction of such cases. (Ga. L. 1967, p. 835, § 1.)

**Law reviews.** — For note, “Seen But Not Heard: An Argument for Granting Evidentiary Hearings to Weigh the Cred-

ibility of Recanted Testimony,” see 46 Ga. L. Rev. 213 (2011).

**JUDICIAL DECISIONS**

**This article clearly expresses a new and liberal policy** on the part of the state as to entertaining habeas corpus petitions by state prisoners. *Hill v. Dutton*, 277 F. Supp. 324 (N.D. Ga. 1967).

**Restrictions on right of access to court** must be drawn so as to avoid unjustifiably obstructing access to the courts and be clearly warranted by the particular circumstances of each case. *Howard v. Sharpe*, 266 Ga. 771, 470 S.E.2d 678 (1996).

**After defendant’s conviction has been affirmed on appeal, habeas corpus petition is one of three available remedies.** — Petitioner’s motion to vacate the conviction was not an appropriate remedy in a criminal case after the peti-

tioner’s murder conviction had been affirmed on direct appeal. The court overruled Division 2 of *Chester v. State*, 284 Ga. 162 (2008), which had allowed such motions under O.C.G.A. § 17-9-4, and held that in order to challenge a conviction after the petition had been affirmed on direct appeal, the petitioner was required to file an extraordinary motion for new trial, O.C.G.A. § 5-5-41, a motion in arrest of judgment, O.C.G.A. § 17-9-61, or a petition for habeas corpus under O.C.G.A. § 9-14-40. *Harper v. State*, 286 Ga. 216, 686 S.E.2d 786 (2009).

**Prisoner given wide latitude in filing petition.** — Under the expanded view in O.C.G.A. Ch. 14, T. 9, the assumption is that a prisoner should have wide



latitude in filing a petition for habeas corpus. *Giles v. Ford*, 258 Ga. 245, 368 S.E.2d 318 (1988).

**Court may not prohibit filing of complaint.** — O.C.G.A. § 9-15-2(d), which permits a trial court to deny the filing of a pro se in forma pauperis complaint after determining that on its face the pleading completely lacks justiciable law or fact, was not meant to apply to habeas corpus proceedings; therefore, a court may address a petition for habeas corpus only after it has been filed. *Giles v. Ford*, 258 Ga. 245, 368 S.E.2d 318 (1988).

**Intent to make state remedy coextensive with federal remedy.** — This article was not designed to alter longstanding criminal trial procedure rules of this state with respect to waiver, but rather to allow the courts of this state to hear and adjudicate collateral attacks of criminal convictions in as broad a fashion as the federal courts, and to make the state remedy coextensive with the federal remedy. *Stewart v. Ricketts*, 451 F. Supp. 911 (M.D. Ga. 1978).

This article was intended to enable state habeas corpus courts to hear all claims which a federal court would hear. *Stewart v. Ricketts*, 451 F. Supp. 911 (M.D. Ga. 1978).

**This article expanded the scope of state habeas corpus**, modified the state doctrine of waiver of rights, and gave the superior court exclusive jurisdiction to try such cases because of "many sharply contested issues of a factual nature." *McCorquodale v. Stynchcombe*, 239 Ga. 138, 236 S.E.2d 486, cert. denied, 434 U.S. 975, 98 S. Ct. 534, 54 L. Ed. 2d 467 (1977).

**Habeas made more readily available.** — It was the intent of the legislature in enacting this article to make the remedy of habeas corpus more readily available to prisoners resorting to the courts of this state and to facilitate a determination in each case of the ultimate issue of the legality or illegality of the imprisonment. *Johnson v. Caldwell*, 229 Ga. 548, 192 S.E.2d 900 (1972).

**Unencumbered hearing assured.** — By its plain terms, this article assures a hearing unencumbered by the strict conditions arising from some case law in this state. *Peters v. Rutledge*, 397 F.2d 731 (5th Cir. 1968).

**The law is an effective remedy for securing state court review of federal challenges** to state convictions, and more than that, it is a legislative recognition by this state of the state's responsibilities to vindicate federally guaranteed, federally protected rights in the administration of justice. *Peters v. Rutledge*, 397 F.2d 731 (5th Cir. 1968).

**Adjudication of guilt or innocence not authorized.** — This article has enlarged the scope of matters that will be considered on habeas corpus, but it does not authorize another adjudication of the question of guilt or innocence of the accused. *Bush v. Chappell*, 225 Ga. 659, 171 S.E.2d 128 (1969).

**Following the statutory structure set out in law serves a triple public interest:** (1) the system, if followed and faithfully applied, puts responsibility on the state; (2) it affords to the one contesting the conviction an effective remedy; and (3) it represents a mutual, even though not jointly expressed, state legislative judgment and a federal judicial comity conclusion that the rapid, explosive expansion of federal habeas cases in state convictions represents a substantial threat to the administration of justice. *Peters v. Rutledge*, 397 F.2d 731 (5th Cir. 1968).

**Two sets of full-blown post-conviction trials not necessary.** — While it is important that federal constitutional claims may be asserted after conviction and that finally there be access to the federal court for its own independent judgment, these rights do not call for two sets of full-blown post-conviction trials; this law serves that end. *Peters v. Rutledge*, 397 F.2d 731 (5th Cir. 1968).

**Denial of right to proceed under article to parolee as subversion of purpose.** — Statute's statement of legislative intent and purpose includes the intent to accord persons convicted in this state an adequate state remedy, and this purpose would be subverted if a state parolee were denied the right to proceed hereunder. *Fox v. Dutton*, 406 F.2d 123 (5th Cir. 1968), cert. denied, 395 U.S. 916, 89 S. Ct. 1764, 23 L. Ed. 2d 229 (1969).

**Cited in** *In re Stoner*, 252 Ga. 397, 314 S.E.2d 214 (1984); *Powell v. Brown*, 281



Ga. 609, 641 S.E.2d 519 (2007); *Nazario v. State*, 293 Ga. 480, 746 S.E.2d 109 (2013).

## RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 13 Am. Jur. Pleading and Practice Forms, Habeas Corpus, § 1.

### 9-14-41. Article as exclusive procedure.

Notwithstanding the other provisions of this chapter, this article provides the exclusive procedure for seeking a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a state court of record. (Code 1933, § 50-127, enacted by Ga. L. 1967, p. 835, § 3.)

## JUDICIAL DECISIONS

**Appellate jurisdiction.** — Habeas corpus is the exclusive post-appeal procedure available to a criminal defendant who asserts the denial of a constitutional right. Therefore, the defendant's claim that the defendant's appellate counsel was ineffective in the defendant's initial appeal could not be heard by the appellate court as the court lacked original jurisdiction to consider whether appellate counsel was ineffective in the prior appeal. *Mallon v. State*, 266 Ga. App. 394, 597 S.E.2d 497 (2004).

Petition for writ of habeas corpus must be filed in the superior court of the county in which the petitioner is detained, and because at the time a defendant filed the amended extraordinary motion for a new trial alleging ineffective assistance of counsel the defendant was incarcerated in a different county from that in which the defendant was tried and filed the motion, that motion could not be treated as a petition for a writ of habeas corpus and the trial court was without authority to consider those contentions. *Johnson v. State*, 272 Ga. App. 294, 612 S.E.2d 29 (2005).

**Exclusive means for seeking review** of life sentences, after review by the sentence review panel and after direct appeal, is through a petition for a writ of habeas corpus under the procedures set forth in O.C.G.A. § 9-14-40 et seq. *Saleem v. Forrester*, 262 Ga. 693, 424 S.E.2d 623, cert. denied, 507 U.S. 1054, 113 S. Ct. 1952, 123 L. Ed. 2d 656 (1993).

**Article liberally applied.** — Petition for writ of habeas corpus should not be dismissed for failure to comply with the technical requirements of O.C.G.A. Art. 2, Ch. 14, T. 9; only when the habeas court is able to determine from the face of the petition that it is without merit is it appropriate to dismiss the petition without a hearing. *Mitchell v. Forrester*, 247 Ga. 622, 278 S.E.2d 368 (1981).

**Parolees as applicants.** — Mention of applicants as "persons whose liberty is being restrained by virtue of a sentence" clearly seems to include parolees. *Fox v. Dutton*, 406 F.2d 123 (5th Cir. 1968), cert. denied, 395 U.S. 916, 89 S. Ct. 1764, 23 L. Ed. 2d 229 (1969).

**Cited** in *Patterson v. Earp*, 257 Ga. 729, 363 S.E.2d 248 (1988); *Derrer v. Anthony*, 265 Ga. 892, 463 S.E.2d 690 (1995).



## RESEARCH REFERENCES

**ALR.** — Statutory remedy as exclusive of remedy by habeas corpus otherwise available, 73 ALR 567.

**9-14-42. Grounds for writ; waiver of objection to jury composition.**

(a) Any person imprisoned by virtue of a sentence imposed by a state court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of this state may institute a proceeding under this article.

(b) The right to object to the composition of the grand or trial jury will be deemed waived under this Code section unless the person challenging the sentence shows in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence have otherwise become final.

(c) Any action brought pursuant to this article shall be filed within one year in the case of a misdemeanor, except as otherwise provided in Code Section 40-13-33, or within four years in the case of a felony, other than one challenging a conviction for which a death sentence has been imposed or challenging a sentence of death, from:

(1) The judgment of conviction becoming final by the conclusion of direct review or the expiration of the time for seeking such review; provided, however, that any person whose conviction has become final as of July 1, 2004, regardless of the date of conviction, shall have until July 1, 2005, in the case of a misdemeanor or until July 1, 2008, in the case of a felony to bring an action pursuant to this Code section;

(2) The date on which an impediment to filing a petition which was created by state action in violation of the Constitution or laws of the United States or of this state is removed, if the petitioner was prevented from filing such state action;

(3) The date on which the right asserted was initially recognized by the Supreme Court of the United States or the Supreme Court of Georgia, if that right was newly recognized by said courts and made retroactively applicable to cases on collateral review; or

(4) The date on which the facts supporting the claims presented could have been discovered through the exercise of due diligence.

(d) At the time of sentencing, the court shall inform the defendant of the periods of limitation set forth in subsection (c) of this Code section. (Code 1933, § 50-127, enacted by Ga. L. 1967, p. 835, § 3; Ga. L. 1975,



p. 1143, § 1; Ga. L. 1982, p. 786, §§ 1, 3; Ga. L. 1984, p. 22, § 9; Ga. L. 2004, p. 917, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2004, in paragraph (c)(1), “July 1, 2004” was substituted for “the effective date of this Code section”, “until July 1, 2005,” was substituted for “from the effective date of this Code section one year”, and “until July 1, 2008,” was substituted for “four years”.

**Editor’s notes.** — Ga. L. 1982, p. 786, § 5, not codified by the General Assembly, declared that that Act is inapplicable to

habeas corpus petitions filed prior to January 1, 1983.

**Law reviews.** — For survey of 1986 Eleventh Circuit cases on constitutional criminal procedure, see 38 Mercer L. Rev. 1141 (1987).

For note, “Seen But Not Heard: An Argument for Granting Evidentiary Hearings to Weigh the Credibility of Recanted Testimony,” see 46 Ga. L. Rev. 213 (2011).

## JUDICIAL DECISIONS

### ANALYSIS

#### IN GENERAL

#### COMPOSITION OF GRAND OR TRIAL JURIES

#### EFFECTIVE ASSISTANCE OF COUNSEL

### In General

**Construction with O.C.G.A. § 17-7-131.** — Since the 1982 amendment of O.C.G.A. § 9-14-42, the question of whether the requirements of O.C.G.A. § 17-7-131 were violated is not cognizable in a habeas action and, accordingly, the habeas court erred in granting the writ based on the court’s construction of those requirements. *Parker v. Abernathy*, 253 Ga. 673, 324 S.E.2d 191 (1985).

**Scope of section.** — Not only can a substantial denial of a federal or state constitutional right be raised on habeas corpus, but a substantial denial of rights under the laws of this state can also be raised pursuant to O.C.G.A. § 9-14-42. *McDuffie v. Jones*, 248 Ga. 544, 283 S.E.2d 601 (1981), overruled on other grounds, *West v. Waters*, 272 Ga. 591, 533 S.E.2d 88 (2000) (decided prior to 1982 amendment).

**Criminal trial procedure rules with respect to waiver.** — These statutes were not designed to alter the state’s longstanding criminal trial procedure rules with respect to waiver; rather, the purpose was to allow courts of this state to hear and adjudicate collateral attacks of criminal convictions in as broad a fashion as the federal courts, and to make the state remedy coextensive with the federal

remedy. *Stewart v. Ricketts*, 451 F. Supp. 911 (M.D. Ga. 1978).

**Right of petitioner to bring federal claims in state habeas court.** — This section was designed to allow a state prisoner to bring in state habeas court any federal claim which the prisoner might also bring in federal court. *Stewart v. Ricketts*, 451 F. Supp. 911 (M.D. Ga. 1978).

**This section seems to have expressly adopted federal standards of waiver.** *Peters v. Rutledge*, 397 F.2d 731 (5th Cir. 1968).

**Valid plea of guilty waives all known or unknown defenses.** *Clark v. Caldwell*, 229 Ga. 612, 193 S.E.2d 816 (1972).

**Plea agreement waiving death penalty.** — Habeas corpus was the proper procedure for the defendant to challenge a plea agreement whereby the defendant promised not to seek any form of relief from life imprisonment in exchange for the state’s waiver of the death penalty. *Allen v. Thomas*, 265 Ga. 518, 458 S.E.2d 107 (1995).

**Failure to show voluntary waiver.** — Defendant’s habeas petition was properly granted as the state failed to meet the state’s burden to show that the defendant voluntarily, knowingly, and intelligently



entered a guilty plea because there was no transcript of the plea hearing and plea counsel had no independent recollection of the case but testified that neither counsel nor the trial court would have advised the defendant of the rights the defendant was waiving and that the defendant was not provided with the plea form before entry of the plea; further, laches was inapplicable and the habeas petition was timely under O.C.G.A. § 9-14-42(c)(1). *State v. Futch*, 279 Ga. 300, 612 S.E.2d 796 (2005).

**Ultimate question in any habeas corpus case is whether the petitioner's rights were violated** in the trial and sentence. *Atkins v. Martin*, 229 Ga. 815, 194 S.E.2d 463 (1972).

**Writ of habeas corpus looks only to lawfulness of present confinement.** *Steed v. Ault*, 229 Ga. 649, 193 S.E.2d 851 (1972).

Since the petitioner did not challenge the validity of the petitioner's sentence or the petitioner's incarceration but challenged only the failure of the board of pardons and paroles to release the petitioner on parole, the petitioner's remedy lay, not in habeas corpus, but in a suit against the board. *Lewis v. Griffin*, 258 Ga. 887, 376 S.E.2d 364 (1989).

**Civil renewal provisions apply in habeas corpus proceedings.** — O.C.G.A. § 9-14-42(c) was not a statute of repose and not an absolute bar to the refile of a habeas corpus petition and, therefore, was not in conflict with the provisions of O.C.G.A. §§ 9-2-60(b) and (c) and 9-11-41(e), which allowed for the renewal of civil actions after dismissal. Therefore, the habeas court's dismissal of a petition as untimely was reversed. *Phagan v. State*, 287 Ga. 856, 700 S.E.2d 589 (2010).

**Lawfulness of possible future imprisonment cannot be determined.** — Only question which this court can entertain in a habeas corpus proceeding is the validity or legality of the present confinement and the sentence under which the petitioner is restrained; lawfulness of a possible future imprisonment under another sentence cannot be therein determined. *Lewis v. Smith*, 227 Ga. 220, 179 S.E.2d 745 (1971).

**Function of writ of habeas corpus** is not to determine guilt or innocence of

person accused of crime, and is not a substitute for review to correct errors of law. *Perdue v. Smith*, 228 Ga. 770, 187 S.E.2d 862 (1972); *Coleman v. Caldwell*, 229 Ga. 656, 193 S.E.2d 846 (1972).

**Time for filing.** — Pro se petition for habeas corpus was untimely because the petition was received by the habeas court one day after the statutory deadline of O.C.G.A. § 9-14-42(c)(1). The habeas court erred in applying the mailbox rule, under which the filing of a pro se petitioner's notice of appeal was deemed filed when delivered to prison officials, because the mailbox rule applied only to an attempted appeal of a pro se habeas petitioner operating under O.C.G.A. § 9-14-52, not to the filing of the initial petition. *Roberts v. Cooper*, 286 Ga. 657, 691 S.E.2d 875 (2010).

**Full hearing required.** — Grant of a writ was vacated after the habeas court terminated the proceeding in the middle of the petitioner's examination of trial counsel, thereby depriving the warden of the right to cross-examine that witness and any other called by the petitioner, and effectively prevented the warden from presenting evidence supportive of the presumption of the conviction's validity. *Gaither v. Gibby*, 267 Ga. 96, 475 S.E.2d 603 (1996).

**Writ of habeas corpus is not a substitute for review** to correct mere errors of law, and may not be used for another adjudication of the question of guilt or innocence of the accused. *Johnson v. Smith*, 227 Ga. 611, 182 S.E.2d 101 (1971).

**Guilt or innocence not determined by writ.** — It is not the function of a writ of habeas corpus to determine the guilt or innocence of one accused of a crime. *Bennefield v. Brown*, 228 Ga. 705, 187 S.E.2d 865 (1972).

**Writ not to review issues already decided on appeal.** — It is not the function of habeas corpus courts to review issues already decided by an appellate court, nor is it the function of the Supreme Court to review, on denial of the writ of habeas corpus, issues previously decided on appeal. *Brown v. Ricketts*, 233 Ga. 809, 213 S.E.2d 672 (1975).

Since the issue that there was insuffi-



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cient corroboration of accomplice testimony was actually litigated, i.e., raised and decided, in the appellant's direct appeal, the issue cannot be reasserted in habeas corpus proceedings. *Gunter v. Hickman*, 256 Ga. 315, 348 S.E.2d 644 (1986).

**Habeas corpus is an available remedy to attack a void judgment.** *Parris v. State*, 232 Ga. 687, 208 S.E.2d 493 (1974).

**Habeas corpus is never a substitute for appeal or other remedial review procedure.** — If one has been convicted of a crime, habeas corpus cannot be used as a substitute for appeal or other remedial procedure for correction of errors and irregularities; it is an appropriate remedy only when judgment or sentence under which the applicant is being restrained is not merely erroneous but is absolutely void. *Brown v. Holland*, 228 Ga. 628, 187 S.E.2d 246 (1972), overruled on other grounds, *Hall v. Hopper*, 234 Ga. 625, 216 S.E.2d 839 (1975).

**Writ of habeas corpus is never a substitute for a review to correct mere errors of law;** it is an available remedy to attack a void judgment. *Bush v. Chappell*, 225 Ga. 659, 171 S.E.2d 128 (1969).

Habeas corpus is never a substitute for review to correct errors of law, nor can it be used as a second appeal for such purpose; it is an appropriate remedy only when the judgment is absolutely void. *Thrash v. Caldwell*, 229 Ga. 585, 193 S.E.2d 605 (1972).

Habeas corpus is not a substitute for appeal for the correction of errors or irregularities. *Green v. Caldwell*, 229 Ga. 650, 193 S.E.2d 847 (1972).

Writ of habeas corpus is never a substitute for appellate review to correct mere errors of law; the writ's function is to attack a void judgment. *Atkins v. Martin*, 229 Ga. 815, 194 S.E.2d 463 (1972).

Habeas corpus may not be used as means of obtaining a second appeal. *Brown v. Ricketts*, 233 Ga. 809, 213 S.E.2d 672 (1975).

**Discharge under habeas cannot be**

**granted unless judgment is void.** — Discharge under a writ of habeas corpus, after conviction, cannot be granted unless the judgment is absolutely void as when the convicting court was without jurisdiction or when the defendant in the defendant's trial was denied due process of law. *Shoemake v. Whitlock*, 226 Ga. 771, 177 S.E.2d 677 (1970).

**Only questions rendering judgment void may be raised.** — Since writ of habeas corpus cannot be used merely as a substitute for a writ of error or other remedial procedure to correct errors of law of which the defendant had the opportunity to avail oneself, no question as to guilt or innocence or as to any irregularity can be so raised, unless it was such as to render the judgment wholly void. *Shoemake v. Whitlock*, 226 Ga. 771, 177 S.E.2d 677 (1970).

**Contentions of alleged irregularities and errors on original trial** cannot be raised in a habeas corpus proceeding. *Perdue v. Smith*, 228 Ga. 770, 187 S.E.2d 862 (1972).

**Only substantive defects cognizable on habeas.** — Substantive defects, such as failure of the indictment to allege conduct which constitutes a crime, are cognizable on habeas corpus because they would render the entire proceedings void ab initio; if, on the other hand, the defect is merely one of form, the defect is waived if not raised prior to trial. *Hopper v. Hampton*, 244 Ga. 361, 260 S.E.2d 73 (1979).

**Issue of improper revocation of probation cognizable.** — Claim that a probation was improperly revoked due to lack of substantial compliance with O.C.G.A. § 42-8-34.1 regarding the conditions imposed on the probation was a cognizable issue for purposes of a habeas corpus proceeding under O.C.G.A. § 9-14-42(a) as confinement under a sentence that was longer than that permitted by state law invoked a constitutional right. *Harvey v. Meadows*, 280 Ga. 166, 626 S.E.2d 92 (2006).

**Full and fair opportunity to litigate determinative.** — Habeas corpus review test on Fourth Amendment claims is whether the defendant had a "full and fair" opportunity to litigate, not whether the claim was, in fact, litigated. *Jacobs v.*



Hopper, 238 Ga. 461, 233 S.E.2d 169 (1977).

**Habeas corpus available only when conviction is final.** — Person imprisoned by virtue of a sentence of a state court of record cannot institute a petition for habeas corpus until the conviction is final. *Horton v. Wilkes*, 250 Ga. 902, 302 S.E.2d 94 (1983).

**Appeal or objection prerequisite to writ.** — Failure to make timely objection to any alleged error or deficiency or to pursue the error on appeal ordinarily will preclude review by a writ of habeas corpus. *Black v. Hardin*, 255 Ga. 239, 336 S.E.2d 754 (1985).

**Habeas corpus is available to review constitutional deprivations only.** *Valenzuela v. Newsome*, 253 Ga. 793, 325 S.E.2d 370 (1985).

State habeas petitioner's entitlement to relief is limited to the denial of state or federal constitutional rights. *Battle v. State*, 235 Ga. App. 101, 508 S.E.2d 467 (1998).

**Consideration of alleged constitutional errors.** — Otherwise valid procedural bar will not preclude a habeas corpus court from considering alleged constitutional errors or deficiencies if there is a showing of adequate cause for the failure to object or to pursue it on appeal and a showing of actual prejudice to the accused. *Black v. Hardin*, 255 Ga. 239, 336 S.E.2d 754 (1985).

**When state court both applies procedural bar and addresses claims on merits,** federal habeas review is precluded only if the state court's adjudication on the merits is made in the alternative and does not constitute the principal basis for the state court's denial of relief on a collateral challenge of the conviction. *Hardin v. Black*, 845 F.2d 953 (11th Cir. 1988).

**Trial under unconstitutional statute.** — One indicted and tried under an unconstitutional statute may, even after final conviction, obtain discharge from custody on a writ of habeas corpus. *Hammock v. Zant*, 243 Ga. 299, 253 S.E.2d 727 (1979).

When a challenge to the constitutionality of the statute under which a defendant was indicted and convicted has not been

ruled upon at trial, the defendant does not waive the defendant's right to raise the issue on habeas corpus. *Barnes v. State*, 244 Ga. 302, 260 S.E.2d 40 (1979).

Individual may challenge constitutionality of the statute under which the individual was convicted for the first time on habeas corpus, and may challenge constitutionality of such statute for the first time on appeal. *Simmons v. State*, 246 Ga. 390, 271 S.E.2d 468 (1980), cert. denied, 449 U.S. 1125, 101 S. Ct. 942, 67 L. Ed. 2d 111 (1981).

**No waiver of constitutional challenge not ruled on.** — When a constitutional challenge has not already been ruled on at trial or on appeal and is thus not barred by res judicata, the defendant has not waived the defendant's right to raise the issue on habeas corpus. *Hammock v. Zant*, 243 Ga. 259, 253 S.E.2d 727 (1979).

**Litigant's procedural defaults in state proceedings do not prevent vindication of the litigant's federal rights** unless the state's insistence on compliance with the state's procedural rule serves a legitimate state interest. *Morgan v. Kiff*, 230 Ga. 277, 196 S.E.2d 445 (1973), overruled on other grounds, *Jacobs v. Hopper*, 238 Ga. 461, 233 S.E.2d 169 (1977).

**Prisoner may raise, by habeas petition, constitutional right** to be tried and sentenced in person. *Anthony v. Hopper*, 235 Ga. 336, 219 S.E.2d 413 (1975), overruled on other grounds, 293 Ga. 656 (2013).

**Petitioner aggrieved by an unconstitutional search and seizure** is entitled to habeas relief on that basis alone. *Wilson v. Hopper*, 234 Ga. 859, 218 S.E.2d 573 (1975).

**Civil complaint not appropriate to challenge conviction.** — Refusal of a prisoner's complaint against district attorneys and assistant district attorneys for violation of the prisoner's constitutional rights and false imprisonment was proper since a petition for a writ of habeas corpus was the appropriate procedure for challenging the conduct of the defendants. *Battle v. Sparks*, 211 Ga. App. 106, 438 S.E.2d 185 (1993).

**Illegal search is no ground for relief absent introduction of evidence**



**In General (Cont'd)**

**seized therein.** — Illegal search is not a ground for relief in habeas corpus in the absence of a showing that evidence obtained thereby was introduced against the petitioner at trial. *Bennefield v. Brown*, 228 Ga. 705, 187 S.E.2d 865 (1972).

**Failure to advise accused of rights or charges not ground for habeas.** — Failure to advise an accused of the accused's rights, which failure does not produce a confession or other incriminating evidence which is used against the accused on trial, and failure to give the accused a hearing prior to trial so as to be advised of the charges against the accused, presents no ground for a writ of habeas corpus. *Atkins v. Martin*, 229 Ga. 815, 194 S.E.2d 463 (1972).

**No ground for relief based on absence of corroboration of the testimony of an accomplice.** — Corroboration of the testimony of an accomplice is a statutory requirement, not a constitutional right. Violation of a state law no longer constitutes a basis for habeas corpus relief. Thus, there is no constitutional nor habeas corpus ground for relief when the contention is the absence of corroboration of the testimony of an accomplice. *Gunter v. Hickman*, 256 Ga. 315, 348 S.E.2d 644 (1986) (concurring opinions).

**Conflict of interest by trial counsel.** — Inmate's claim that trial counsel had a conflict of interest was a Sixth Amendment claim and thus was cognizable on habeas corpus. *Gibson v. Head*, 282 Ga. 156, 646 S.E.2d 257 (2007).

**Waiver of right to counsel.** — Burden is on prosecution to affirmatively establish valid waiver of right to counsel and waiver may not be presumed from a silent record. *Blaylock v. Hopper*, 233 Ga. 504, 212 S.E.2d 339 (1975).

Anything less than a showing, from the record, or from allegation and evidence, that the accused was offered counsel but intelligently and understandingly rejected the offer, is not a waiver of the right of counsel. *Blaylock v. Hopper*, 233 Ga. 504, 212 S.E.2d 339 (1975).

In the absence of any showing that the indigent petitioner was aware of the petitioner's right to appointed counsel, it can-

not be said that the petitioner intentionally abandoned or waived that right. *Blaylock v. Hopper*, 233 Ga. 504, 212 S.E.2d 339 (1975).

**Waiver established.** — Habeas corpus petitioner's claim of ineffective assistance of trial counsel was waived since appellate counsel, who was not the petitioner's trial counsel, failed to assert it on direct appeal and the petitioner failed to demonstrate cause for the failure to raise the claim and prejudice arising therefrom. *White v. Kelso*, 261 Ga. 32, 401 S.E.2d 733 (1991).

**No waiver of rights established.** — Record failed to show that federal or state constitutional rights asserted to have been violated were waived. *Stynchcombe v. Floyd*, 252 Ga. 113, 311 S.E.2d 828 (1984).

**Denial of a preliminary hearing is not a valid ground for writ of habeas corpus.** *Wilson v. Hopper*, 234 Ga. 859, 218 S.E.2d 573 (1975).

**Remedy for newly discovered evidence is by extraordinary motion for new trial, not by habeas corpus.** *Bush v. Chappell*, 225 Ga. 659, 171 S.E.2d 128 (1969).

**Insufficiency of evidence is not grounds for habeas corpus relief.** *Allen v. Hopper*, 234 Ga. 642, 217 S.E.2d 156 (1975).

**Venue.** — Having failed to obtain a new trial in the trial court or the Court of Appeals on the ground of insufficiency of the evidence to prove venue, one convicted of a crime cannot relitigate this issue by habeas corpus. *Bush v. Chappell*, 225 Ga. 659, 171 S.E.2d 128 (1969).

Contentions of prisoner that the evidence was insufficient to support the verdict against the prisoner and that the trial court erred in admitting certain evidence over objection of the prisoner's attorney did not raise any question which would authorize the setting aside of the prisoner's conviction. *Coleman v. Caldwell*, 229 Ga. 656, 193 S.E.2d 846 (1972).

Contention that petitioner was not guilty of the offense with which the petitioner was charged seeks to raise issue as to whether the trial court was authorized from the evidence presented to find the petitioner guilty and presents no ground for a writ of habeas corpus. *Atkins v.*



Martin, 229 Ga. 815, 194 S.E.2d 463 (1972).

Claims as to sufficiency of evidence may not be raised in a state habeas corpus proceeding. *Littles v. Balkcom*, 245 Ga. 285, 264 S.E.2d 219 (1980).

Law of this state requires claims as to the sufficiency of the evidence to be raised on direct appeal; such a claim may not be raised in a state habeas corpus proceeding. *Stephens v. Balkcom*, 245 Ga. 492, 265 S.E.2d 596 (1980).

**Subornation of perjury as ground for writ.** — Subornation of perjury by the state in order to obtain a conviction is a denial of the defendant's right to due process, and constitutes grounds for the writ of habeas corpus. *Phillips v. Hopper*, 237 Ga. 68, 227 S.E.2d 1 (1976).

**Failure to charge jury on defense.** — Trial court's failure to charge the jury on the state's burden to disprove the defendant's accident defense did not entitle the defendant to habeas corpus relief because the omission of the requested jury charge at the defendant's murder trial affected only a substantive claim and did not violate the defendant's constitutional right to due process. *Bruce v. Smith*, 274 Ga. 432, 553 S.E.2d 808 (2001).

**Power of Supreme Court to review charges to jury.** — Although the general rule is that jury charges are not reviewable on habeas except for a charge which is so defective that it renders the trial fundamentally unfair, the Supreme Court always has the power to review charges, whether objected to or not. *Stephens v. Hopper*, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 667 (1978).

**Supreme court review of sentencing charge in capital case.** — In a death case, sentencing charge is so crucial to the outcome of the trial that the Supreme Court will exercise its power to review those charges when the issue is placed before it on habeas, whether or not objection was made in the trial court. *Stephens v. Hopper*, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 667 (1978).

**Refusal to consider or grant parole.** — Prisoner cannot be discharged from the penitentiary before the expiration of the

prisoner's sentence merely because the Board of Pardons and Paroles refuses to hear the prisoner's application for parole or to grant the prisoner a parole. *Davis v. Caldwell*, 229 Ga. 605, 193 S.E.2d 617 (1972).

On habeas corpus, court has no authority to control or in any manner interfere with the functions of the executive department in issuing pardons or paroles; these are discretionary matters and habeas corpus does not lie to control exercise of that discretion. *Davis v. Caldwell*, 229 Ga. 605, 193 S.E.2d 617 (1972); *Whippler v. Caldwell*, 231 Ga. 41, 200 S.E.2d 144 (1973).

Defendant's claim arising from the parole board's determination that the defendant was no longer eligible for parole was not cognizable in habeas corpus proceedings. *Johnson v. Griffin*, 271 Ga. 663, 522 S.E.2d 657 (1999).

**Denial of appeal resulting from prisoner's escape after conviction** is not ground for grant of a writ of habeas corpus, dismissal of such an appeal being on the theory that the escaped prisoner should not be allowed to reap the benefit of a decision in the prisoner's favor when the state could not enforce a decision in the state's favor; if, however, information or proof reaches the appellate court of the surrender or recapture of the escaped appellant before the dismissal, the appeal should not be dismissed summarily. *Yates v. Brown*, 235 Ga. 391, 219 S.E.2d 729 (1975).

**Conviction after temporary release to another sovereignty.** — Permanent waiver of custody and jurisdiction need not be inferred from temporary release to another sovereignty and such argument does not present a valid ground on which to grant habeas corpus relief from a valid conviction and sentence. *Lenear v. Hopper*, 234 Ga. 338, 216 S.E.2d 95 (1975).

**Conditions of confinement.** — Application for writ of habeas corpus is not the proper procedure for attacking treatment, discipline, or conditions of confinement being imposed upon an inmate by the Department of Corrections (now Department of Offender Rehabilitation). *Brown v. Caldwell*, 231 Ga. 795, 204 S.E.2d 137 (1974).



**In General (Cont'd)**

**Claim to credit for time incarcerated.** — Claim seeking credit for time incarcerated on a previous conviction which had been set aside is not a proper one for habeas corpus relief. *Whippler v. Caldwell*, 231 Ga. 41, 200 S.E.2d 144 (1973).

**Claim of confinement beyond the term of a lawful sentence** was cognizable in a habeas corpus proceeding. *Lillard v. Head*, 267 Ga. 291, 476 S.E.2d 736 (1996).

**Violation of federal statute.** — Violation of a federal statute in proceedings leading to a prisoner's conviction and detention is not grounds for relief on habeas corpus, though relief is available for violations of rights guaranteed by state and federal Constitutions and state statutes. *Gooding v. Dudley*, 232 Ga. 321, 206 S.E.2d 490 (1974).

**Old idea that immediate release from physical custody is only remedy** available under habeas corpus is dead. *Parris v. State*, 232 Ga. 687, 208 S.E.2d 493 (1974).

**Mere fact that sentence has been completely served** should not bar attack through habeas corpus, even though the petition is not initially filed until after the sentence is completed. *Parris v. State*, 232 Ga. 687, 208 S.E.2d 493 (1974).

**If adverse consequences remain.** — Habeas corpus petitioner's cause does not become moot simply because prior to final adjudication the petitioner is unconditionally released from custody, if adverse collateral consequences of the conviction continue to plague the petitioner. *Parris v. State*, 232 Ga. 687, 208 S.E.2d 493 (1974).

Habeas corpus petition which alleges that the petitioner's conviction is void will not be dismissed as being moot, even though the petitioner's sentence has been completely served, when the petitioner is suffering collateral consequences in the nature of a due process violation. *Nix v. State*, 233 Ga. 73, 209 S.E.2d 597 (1974); *Shakur v. State*, 239 Ga. 548, 238 S.E.2d 85 (1977).

**Enhancement of federal sentence by void state sentence.** — Petitioner is suffering collateral consequences in the

nature of a due process violation if a void state conviction is used to enhance a federal sentence. *Parris v. State*, 232 Ga. 687, 208 S.E.2d 493 (1974).

**Attacking one of multiple concurrent sentences.** — Prisoner may, in some circumstances, on habeas corpus attack one of multiple concurrent sentences on habeas; habeas court should consider whether the prisoner's confinement pursuant to the sentence being attacked is enhancing the prisoner's imprisonment under other concurrent sentences by, for example, delaying the prisoner's eligibility for parole, or whether the prisoner is for any other reason "restrained of his liberty" by the attacked sentence, within the meaning of this section, beyond the restraint flowing from other sentences. *Jones v. Hopper*, 233 Ga. 531, 212 S.E.2d 367 (1975).

**New trial on issue of punishment held necessary when sentence was aggravated by unconstitutional convictions.** — When evidence adduced at habeas proceeding clearly showed that at least two of the prior convictions submitted in aggravation of punishment were wholly unconstitutional, a new trial on the issue of punishment must be given, even though no objection was made to the admission of prior invalid convictions at the criminal trial. *Hopper v. Thompson*, 232 Ga. 417, 207 S.E.2d 57 (1974).

**Cited in** *King v. Adams*, 410 F.2d 455 (5th Cir. 1969); *Proctor v. Ault*, 230 Ga. 669, 198 S.E.2d 671 (1973); *Spencer v. Hopper*, 243 Ga. 532, 255 S.E.2d 1 (1979); *Birt v. Hopper*, 245 Ga. 221, 265 S.E.2d 276 (1980); *Alderman v. Austin*, 498 F. Supp. 1134 (S.D. Ga. 1980); *Littles v. DeFrancis*, 517 F. Supp. 1137 (M.D. Ga. 1981); *Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir. 1982); *Mitchell v. Hopper*, 538 F. Supp. 77 (S.D. Ga. 1982); *Birt v. Montgomery*, 725 F.2d 587 (11th Cir. 1984); *Westbrook v. Zant*, 743 F.2d 764 (11th Cir. 1984); *Lancaster v. Newsome*, 880 F.2d 362 (11th Cir. 1989); *Derrer v. Anthony*, 265 Ga. 892, 463 S.E.2d 690 (1995); *Manville v. Hampton*, 266 Ga. 857, 471 S.E.2d 872 (1996); *Bruce v. Smith*, 274 Ga. 432, 553 S.E.2d 808 (2001); *Taylor v. Williams*, 528 F.3d 847 (11th Cir. 2008); *Owens v. Hill*, 295 Ga. 302, 758 S.E.2d 794



(2014); *Tolbert v. Toole*, 296 Ga. 357, 767 S.E.2d 24 (2014).

### **Composition of Grand or Trial Juries**

**Editor's notes.** — Prior to amendment by Ga. L. 1975, p. 1143, § 1, O.C.G.A. § 9-14-42 made no special requirement as to showing cause for objecting to jury composition after conviction and sentence. Hence, decisions rendered prior to the 1975 amendment should be consulted with care.

**Retroactive application of 1975 amendment to O.C.G.A. § 9-14-42**, exempting from the blanket non-waiver rule (deleted by the 1982 amendment) challenges to the composition of grand or traverse juries, is not an independent and adequate state ground sufficient to preclude federal court consideration of the merits of a petitioner's claim. *Spencer v. Kemp*, 781 F.2d 1458 (11th Cir. 1986), cert. denied, 500 U.S. 960, 111 S. Ct. 2276, 114 L. Ed. 2d 727 (1991).

**Retroactive application of Taylor.** — Since former Ga. Code. 1933, § 50-127 applied to the state inmate's 1974 trial, the state habeas court's finding that the inmate's jury composition claims were procedurally defaulted under the later enacted O.C.G.A. § 9-14-42 was not a dependent and adequate state ground precluding federal relief, but since the jury was empaneled before Taylor, which held that petit juries had to be drawn from a source fairly representative of the community, Taylor did not apply retroactively because Teague barred the claim. *Prevatte v. French*, 459 F. Supp. 2d 1305 (N.D. Ga. 2006), aff'd, 547 F.3d 1300 (11th Cir. Ga. 2008).

**Showing of "cause" required to object to composition of grand or trial jury.** — Right to object to the composition of grand and trial juries in habeas corpus proceedings is deemed waived unless the petitioner demonstrates that "cause" exists for the petitioner's being allowed to pursue the objection after conviction and sentence have otherwise become final, and in order to satisfy this requirement, the petitioner must make a showing of "cause" for the petitioner's failure to challenge the jury composition in a timely fashion either

at or before trial. *Pulliam v. Balkcom*, 245 Ga. 99, 263 S.E.2d 123, cert. denied, 447 U.S. 927, 100 S. Ct. 3023, 65 L. Ed. 2d 1121 (1980).

Since there was no timely challenge to the composition of the grand or traverse juries before or during trial and the federal habeas petitioner did not show cause for noncompliance or actual prejudice, the petitioner was not entitled to habeas relief. *Dix v. Newsome*, 584 F. Supp. 1052 (N.D. Ga. 1984).

**Mandatory "cause" requirement as legitimate state interest.** — Showing of "cause" is mandatory under subsection (b) of this section, and represents a legitimate state interest in the finality of the litigation. *Fountain v. York*, 237 Ga. 784, 229 S.E.2d 629 (1976).

**Showing of "cause" under subsection (b) involves two matters:** (1) justification of the failure to raise jury composition questions in a timely fashion; and (2) a showing of actual prejudice. *Fountain v. York*, 237 Ga. 784, 229 S.E.2d 629 (1976).

**Prejudice relevant to existence of "cause".** — In determining whether "cause" has been shown for allowing an untimely jury challenge, it is entirely appropriate to take prejudice or the absence thereof into account. *Patterson v. Balkcom*, 245 Ga. 563, 266 S.E.2d 179 (1980).

**Actual composition of juries may be considered.** — In determining whether or not a defendant has been prejudiced by allegedly unconstitutional jury selection procedures, so as to allow the defendant to make an untimely jury challenge, it is entirely appropriate to inquire into the actual composition of the grand or trial juries in the defendant's case. *Patterson v. Balkcom*, 245 Ga. 563, 266 S.E.2d 179 (1980).

**Prejudice presumed if jury pool challenged prior to trial.** — If challenged prior to trial, a movant is not required to demonstrate prejudice flowing from an unconstitutionally composed jury pool. The prejudice is presumed. *Birt v. Montgomery*, 709 F.2d 690 (11th Cir. 1983), cert. denied, 469 U.S. 874, 105 S. Ct. 232, 83 L. Ed. 2d 161 (1984).

**Failure to challenge jury as trial tactic not "cause".** — Since trial coun-



### **Composition of Grand or Trial Juries (Cont'd)**

sel's failure to file timely jury challenges was the result of a tactical decision, the reliance by the defendant upon ineffectiveness of counsel to satisfy the "cause" requirement of O.C.G.A. § 9-14-42 must fail. *Zant v. Gaddis*, 247 Ga. 717, 279 S.E.2d 219, cert. denied, 454 U.S. 1037, 102 S. Ct. 579, 70 L. Ed. 2d 483 (1981).

**Challenge to composition of grand jury, not filed prior to return of indictment**, cannot be asserted as a ground for a writ of habeas corpus unless it is shown in the petition that cause exists for being allowed to pursue the objection to the grand jury's composition after the conviction and sentence have otherwise become final. *Godfrey v. Francis*, 251 Ga. 652, 308 S.E.2d 806 (1983), cert. denied, 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984).

**Disadvantage must be shown to establish violation of jury pool composition warranting reversal.** — Assuming that a county traverse the jury pool was composed unconstitutionally, the defendant could benefit from such violation only if it worked to the defendant's actual and substantial disadvantage. *Birt v. Montgomery*, 709 F.2d 690 (11th Cir. 1983), cert. denied, 469 U.S. 874, 105 S. Ct. 232, 83 L. Ed. 2d 161 (1984).

**Failure to raise question as to make-up of jury until after the verdict** constitutes a waiver of any contention as to the legality of the jury's make-up. *Atkins v. Martin*, 229 Ga. 815, 194 S.E.2d 463 (1972).

**Six appeals without objection to jury composition as waiver.** — Although there is no specific standard in this section which delineates at what point the defendant has waived a constitutional claim, it strains the mind to incredulity to think that after six appeals without an objection to the composition of the jury which indicted and convicted the defendant, the defendant has not waived the objection. *Ferguson v. Caldwell*, 233 Ga. 887, 213 S.E.2d 855 (1975).

**Drawing of jurors in open court not due process violation.** — Petitioner in a habeas corpus hearing has not been de-

prived of due process or equal protection simply because jurors must be drawn in open court. *Hill v. Stynchcombe*, 225 Ga. 122, 166 S.E.2d 729 (1969).

**Issue considered on appeal not subject to relitigation on habeas.** — When issue as to excusing two jurors for opposition to the death penalty was considered on direct appeal, the issue could not be relitigated on habeas. *Smith v. Hopper*, 240 Ga. 93, 239 S.E.2d 510 (1977).

**Refusal to consider illegal composition of jury held error.** — Habeas corpus court was in error in refusing to hear evidence on the question of the illegal composition of the jury since that question had not previously been decided. *Mitchell v. Smith*, 229 Ga. 781, 194 S.E.2d 414 (1972).

### **Effective Assistance of Counsel**

**When ineffective assistance claim warrants overturning conviction.** — Defendant would be entitled to have conviction overturned on ground of ineffective assistance of counsel upon proof that defense counsel, who had not raised a question as to the grand jury's composition, was actively involved in the county's defense to a constitutional challenge of the grand jury composition in another case. *Westbrook v. Zant*, 704 F.2d 1487 (11th Cir. 1983), overruled on other grounds, *Peek v. Kemp*, 784 F.2d 1479 (11th Cir. 1986), cert. denied, 479 U.S. 939, 107 S. Ct. 421, 93 L. Ed. 2d 371 (1986).

**Counsel representing both defendant and district attorney.** — Inmate who pled guilty to malice murder and aggravated assault and was serving a sentence of life plus years was entitled to habeas corpus relief because the counsel who represented the inmate at the guilty plea was simultaneously representing the district attorney, creating an actual conflict of interest and, given the enormity of the penalty the inmate faced, the conflict was impermissible. *Howerton v. Danenberg*, 279 Ga. 861, 621 S.E.2d 738 (2005).

**Noncognizable, statutory claim regarding voir dire examination** was not converted into a cognizable, constitutional claim merely by the allegation of ineffective assistance of counsel. *Green v. Dunn*,



257 Ga. 66, 355 S.E.2d 61 (1987).

**Prejudice not found as to claim that counsel failed to obtain funds for forensic experts.** — Death row inmate's habeas corpus petition under O.C.G.A. § 9-14-42(a) alleging ineffective assistance of counsel in failure to secure funds for forensic experts failed because his theory of how his wife and her boyfriend was admitted to be possible by the state's experts, and the real issue was one of the

inmate's credibility in light of non-forensic evidence that he had raped, harassed, and threatened to kill his wife in the past; therefore, his lack of funds for forensic experts did not prejudice his defense as required by O.C.G.A. § 9-14-48(d). His claim that the state presented false testimony, however, required additional findings of fact and conclusions, necessitating remand. *McMichen v. Hall*, 684 S.E.2d 641, 2009 Ga. LEXIS 640 (2009).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, §§ 99, 142, 143.

**C.J.S.** — 39A C.J.S., Habeas Corpus, § 283.

**ALR.** — Habeas corpus to test constitutionality of ordinance under which petitioner is held, 32 ALR 1054.

Habeas corpus in case of sentence which is excessive because imposing both fine and imprisonment, 49 ALR 494.

Power to grant writ of habeas corpus pending appeal from conviction, 52 ALR 876.

Habeas corpus to test the sufficiency of indictment or information as regards the offense sought to be charged, 57 ALR 85.

Illegal or erroneous sentence as ground for habeas corpus, 76 ALR 468.

Bar of limitations as proper subject of investigation in extradition proceedings or in habeas corpus proceedings for release of one sought to be extradited, 77 ALR 902.

Remedy of one convicted of crime while insane, 121 ALR 267.

Disqualification of judge who presided at trial or of juror as ground of habeas corpus, 124 ALR 1079.

Failure to examine witnesses to determine degree of guilt before pronouncing sentence upon plea of guilty as ground for habeas corpus, 134 ALR 968.

Change of judicial decision as ground of habeas corpus for release of one held upon

previous adjudication or conviction of contempt, 136 ALR 1032.

Relief in habeas corpus for violation of accused's right to assistance of counsel, 146 ALR 369.

Habeas corpus as remedy where one is convicted, upon plea of guilty or after trial, of offense other than one charged in indictment or information, 154 ALR 1135.

Habeas corpus on ground of unlawful treatment of prisoner lawfully in custody, 155 ALR 145.

Habeas corpus on ground of defective title to office of judge, prosecuting attorney, or other officer participating in petitioner's trial or confinement, 158 ALR 529.

Invalidity of prior conviction or sentence as ground of habeas corpus where one is sentenced as second offender, 171 ALR 541.

Former jeopardy as ground for habeas corpus, 8 ALR2d 285.

Habeas corpus on ground of deprivation of right to appeal, 19 ALR2d 789.

Insanity of accused at time of commission of offense, not raised at trial, as ground for habeas corpus or coram nobis after conviction, 29 ALR2d 703.

When is a person in custody of governmental authorities for purpose of exercise of state remedy of habeas corpus — modern cases, 26 ALR4th 455.

Ineffective assistance of counsel: use or nonuse of interpreter at prosecution of foreign language speaking defendant, 79 ALR4th 1102.

## 9-14-43. Jurisdiction and venue.

A petition brought under this article must be filed in the superior court of the county in which the petitioner is being detained. The



superior courts of such counties shall have exclusive jurisdiction of habeas corpus actions arising under this article. If the petitioner is not in custody or is being detained under the authority of the United States, any of the several states other than Georgia, or any foreign state, the petition must be filed in the superior court of the county in which the conviction and sentence which is being challenged was imposed. (Code 1933, § 50-127, enacted by Ga. L. 1967, p. 835, § 3; Ga. L. 2004, p. 917, § 2.)

**Law reviews.** — For note, “Ineffective Assistance of Counsel Blues: Navigating the Muddy Waters of Georgia Law After

2010 State Supreme Court Decisions,” see 45 Ga. L. Rev. 1199 (2011).

### JUDICIAL DECISIONS

**Jurisdiction vested exclusively in superior court of county of detention.**

— Under this section, jurisdiction to hear petitions for habeas corpus is vested exclusively in the superior court of the county wherein the petitioner is being detained. *Strauss v. Stynchcombe*, 224 Ga. 859, 165 S.E.2d 302 (1968).

**Motion to vacate or set aside may not be treated as habeas corpus petition except in superior court.** — While a motion to vacate and set aside sentence, made after the original term has passed, may, in appropriate circumstances, be treated as a habeas corpus petition, when the trial court is not a superior court, it has no jurisdiction to adopt such an approach. *Thigpen v. State*, 165 Ga. App. 837, 303 S.E.2d 81 (1983).

**Petition for habeas corpus must be filed in county of petitioner’s confinement.** *Jones v. Luzier*, 345 F. Supp. 724 (N.D. Ga. 1972).

Venue in habeas corpus cases involving restraint of the personal liberty of a prisoner within the state lies in the county where the actual physical detention exists. *Smith v. Garner*, 236 Ga. 81, 222 S.E.2d 351 (1976).

Jurisdiction and venue lie in the superior court of the county in which the petitioner is actually and physically detained, even though the petitioner’s custody has been transferred there under authority of the State Board of Corrections (now Board of Offender Rehabilitation). *Smith v. Garner*, 236 Ga. 81, 222 S.E.2d 351 (1976).

Proper method for challenging the validity of a guilty plea and resulting sentence is through habeas corpus proceedings; however, a petition for habeas corpus must be filed in a superior court of the county where a prisoner is detained. *Goodrum v. State*, 259 Ga. App. 704, 578 S.E.2d 484 (2003).

Habeas corpus is the exclusive post-appeal procedure available to a criminal defendant who asserts the denial of a constitutional right such as effective assistance of counsel, and a habeas corpus action must be filed in the superior court of the county in which the petitioner is detained, which is the only court that has jurisdiction over such a petition; because, at the time the defendant filed the amended extraordinary motion for new trial raising ineffective assistance of counsel contentions, the defendant was incarcerated in a different county from that in which the defendant was tried and brought the motions, that motion could not have been treated as a petition for a writ of habeas corpus and the trial court was without authority to consider those contentions. *Johnson v. State*, 272 Ga. App. 294, 612 S.E.2d 29 (2005).

**Petition for habeas corpus must be filed in county of petitioner’s conviction.** — Order entered by a superior court in Fulton County granting a parolee’s petition for a writ of habeas corpus was a nullity; the parolee was “not in custody” for purposes of O.C.G.A. § 9-14-43 and, therefore, only the superior court in Floyd County, the county where the parolee had



been convicted, could consider the petition for a writ of habeas corpus. *Nix v. Watts*, 284 Ga. 100, 664 S.E.2d 194 (2008).

**Petition for habeas corpus not filed in convicting court.** — Motion to appeal a conviction, in the nature of a petition for the writ of habeas corpus, should have been filed in the superior court of the county wherein the petitioner was being detained, not in the convicting court. *Neal v. State*, 232 Ga. 96, 205 S.E.2d 284 (1974).

Criminal defendant's motion in arrest of judgment filed three years late could not be construed as a petition for habeas corpus because the petition was filed in the county in which the defendant was convicted, rather than against the warden in the county in which the defendant was incarcerated. *Lacey v. State*, 253 Ga. 711, 324 S.E.2d 471 (1985).

Defendant's pleading, which sought an out-of-time appeal under circumstances when such an appeal was not permitted, could not be considered a petition for writ of habeas corpus since the defendant, while a prisoner in a state facility, filed the pleading against the state in the superior court of the county of conviction rather than against the warden of the institution in which the defendant was incarcerated and in the superior court of the county of the defendant's incarceration as required by O.C.G.A. § 9-14-43. *Richards v. State*, 275 Ga. 190, 563 S.E.2d 856 (2002).

**Location of filing if future consecutive sentence is being attacked.** — Person who is being restrained under sentence of a state court of record must file a petition in the county where the person is detained; this rule applies even if the sentence being attacked is not the one being served, that is, even if a future consecutive sentence is being attacked. *Smith v. State*, 234 Ga. 390, 216 S.E.2d 111 (1975).

**Transfer of habeas petition proper when petitioner transferred after filing petition.** — Superior court properly permitted the transfer of an inmate's habeas corpus petition from the county in which the petition was filed to the county to which the inmate was transferred after filing the petition as only the superior court of the county where a habeas peti-

tioner is currently detained has jurisdiction to address the merits of the claim; however, such a holding is limited to instances when a petitioner's county of incarceration is changed for legitimate or routine reasons and not to frustrate habeas relief. *Preer v. Johnson*, 279 Ga. 90, 610 S.E.2d 46 (2005).

**Petitioner incarcerated within federal penal system.** — When petitioner is restrained of the petitioner's liberty within the federal penal system in this state, venue of the petitioner's action against the state in the nature of habeas corpus is in the superior court of the county where the petitioner is incarcerated by federal authorities. *Smith v. State*, 234 Ga. 390, 216 S.E.2d 111 (1975).

When a petitioner is incarcerated by federal authorities within this state, the proper county in which to bring the petition for writ of habeas corpus is the county in which the petitioner is detained. *Craig v. State*, 234 Ga. 398, 216 S.E.2d 296 (1975).

Construing the defendant's request for an out-of-time appeal from a 1995 resentencing on various convictions as one seeking habeas corpus relief, and in light of the language in O.C.G.A. § 9-14-43, the trial court's order denying the defendant relief on jurisdictional grounds was reversed and the matter was remanded for the trial court to consider the defendant's motion as one for a writ of habeas corpus. *Anderson v. State*, 284 Ga. App. 776, 645 S.E.2d 362 (2007).

**Petitioner restrained by federal authorities outside state.** — When a petitioner who desires to attack an allegedly void conviction is restrained by federal authorities in another state, proper jurisdiction to entertain the petitioner's habeas petition is the one in which the petitioner was sentenced. *Craig v. State*, 234 Ga. 398, 216 S.E.2d 296 (1975).

**Section governs habeas petitions arising out of delinquency proceedings.** — This section is controlling as to jurisdiction and venue for habeas corpus petitions arising out of delinquency proceedings in the juvenile court, even though such proceedings are civil in nature, in order to protect minors from a criminal record. *Colton v. Martins*, 230 Ga. 482, 197 S.E.2d 729 (1973).



**Jurisdiction when petitioner challenges driver's license revocation. —**

When a person whose driver's license has been revoked by the commissioner of public safety seeks reinstatement of the license, venue in a resulting habeas corpus proceeding resulting from denial of reinstatement is proper not only in the county in which the agency which is restraining the driver is located, but also in the place of conviction. *Hardison v. Martin*, 254 Ga. 719, 334 S.E.2d 161 (1985).

**Cited in** *Parks v. Ault*, 229 Ga. 228, 190 S.E.2d 540 (1972); *Chandler v. Ault*, 234 Ga. 346, 216 S.E.2d 101 (1975); *Grant v. State*, 159 Ga. App. 2, 282 S.E.2d 668 (1981); *James v. Hight*, 251 Ga. 563, 307 S.E.2d 660 (1983); *Stargell v. State*, 204 Ga. App. 45, 418 S.E.2d 372 (1992); *Worle v. State*, 227 Ga. App. 575, 489 S.E.2d 374 (1997); *State v. Smith*, 276 Ga. 14, 573 S.E.2d 64 (2002).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, § 98.

**C.J.S.** — 39A C.J.S., Habeas Corpus, § 272.

## 9-14-44. Petition — Contents and verification.

A petition brought under this article shall identify the proceeding in which the petitioner was convicted, give the date of rendition of the final judgment complained of, clearly set forth the respects in which the petitioner's rights were violated, and state with specificity which claims were raised at trial or on direct appeal, providing appropriate citations to the trial or appellate record. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that the petitioner may have taken to secure relief from his or her conviction and, in the case of prior habeas corpus petitions, shall state which claims were previously raised. Argument and citations of authorities shall be omitted from the petition; however, a brief may be submitted in support of the petition setting forth any applicable argument. The petition must be verified by the oath of the applicant or of some other person in his or her behalf. (Code 1933, § 50-127, enacted by Ga. L. 1967, p. 835, § 3; Ga. L. 1995, p. 381, § 3.)

**Editor's notes.** — Ga. L. 1995, p. 381, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Death Penalty Habeas Corpus Reform Act of 1995.'"

Ga. L. 1995, p. 381, § 2, not codified by the General Assembly, provides for legislative intent and purpose for this Act.

## JUDICIAL DECISIONS

**Petition for habeas corpus must set out facts upon which the petition is predicated**, as distinguished from allegations of mere conclusions, and these facts should be specific and not merely

general. *Salisbury v. Grimes*, 223 Ga. 776, 158 S.E.2d 412 (1967).

**Issue of right to counsel not raised as ground for habeas corpus relief.** —

While a respondent was entitled to coun-



sel on a motion to withdraw a guilty plea to aggravated assault but proceeded pro se on an appeal of the denial of that motion, the issue of the right to counsel was never raised as a ground for habeas corpus relief as required by O.C.G.A. §§ 9-14-44 and 9-14-51 and, thus, the respondent was improperly granted a writ of habeas corpus. *Murrell v. Young*, 285 Ga. 182, 674 S.E.2d 890 (2009).

**Mere allegations insufficient.** — Mere allegation that one has been denied constitutional guarantees, without setting forth facts substantiating a violation of such rights, is not a sufficient reason for setting aside a sentence on habeas corpus. *Salisbury v. Grimes*, 223 Ga. 776, 158 S.E.2d 412 (1967).

**Verification of habeas corpus petition.** — When a prisoner completed a form provided by the Administrative Office of the Courts in filing the prisoner's habeas corpus petition, dismissal of the application was improper even though the verification statement did not comply with the traditional form. *Heaton v. Lemacks*, 266 Ga. 189, 466 S.E.2d 7 (1996).

**Separate or joint petitions maintainable for attack on separate con-**

**victions.** — Separate convictions pursuant to different trials, with separate grounds for habeas corpus relief, may be attacked by separate petitions as different convictions under separate trials would necessarily involve different offenses and proceedings, and could possibly involve different attorneys and completely different circumstances, but this does not foreclose the option of attacking both convictions in a single habeas corpus petition. *Hunter v. Brown*, 236 Ga. 168, 223 S.E.2d 145 (1976).

**Waiver of challenge to method of proportionality review.** — Habeas corpus petitioner failed to assert in the original petition, the amended petition, or the post-hearing brief a constitutional or statutory challenge to the Supreme Court of Georgia's method of proportionality review as provided in O.C.G.A. § 17-10-35(c); therefore, the petitioner's challenge was waived. *Hall v. Lee*, 286 Ga. 79, 684 S.E.2d 868 (2009).

**Cited in** *Beavers v. Smith*, 227 Ga. 344, 180 S.E.2d 717 (1971); *Calhoun v. Caldwell*, 228 Ga. 804, 188 S.E.2d 498 (1972); *Proctor v. Ault*, 230 Ga. 669, 198 S.E.2d 671 (1973); *Horton v. Wilkes*, 250 Ga. 902, 302 S.E.2d 94 (1983).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, §§ 98, 145 et seq.

**C.J.S.** — 39A C.J.S., Habeas Corpus, § 288 et seq.

## 9-14-45. Petition — Service.

Service of a petition brought under this article shall be made upon the person having custody of the petitioner. If the petitioner is being detained under the custody of the Department of Corrections, an additional copy of the petition shall be served on the Attorney General. If the petitioner is being detained under the custody of some authority other than the Department of Corrections, an additional copy of the petition shall be served upon the district attorney of the county in which the petition is filed. Service upon the Attorney General or the district attorney may be had by mailing a copy of the petition and a proper certificate of service. (Code 1933, § 50-127, enacted by Ga. L. 1967, p. 835, § 3; Ga. L. 1985, p. 283, § 1.)



## JUDICIAL DECISIONS

**District attorney's authority outside judicial circuit.** — District attorney lacks authority to assert the state's interest in that official capacity in a habeas action originating outside of the district attorney's own judicial circuit. *Wiggins v. Lemley*, 256 Ga. 152, 345 S.E.2d 584 (1986).

**Motion not construed as habeas petition when filed in county of conviction.** — Criminal defendant's motion in arrest of judgment filed three years late could not be construed as a petition for habeas corpus because the motion was filed in the county in which the defendant was convicted, rather than against the warden in the county in which the defendant was incarcerated. *Lacey v. State*, 253 Ga. 711, 324 S.E.2d 471 (1985).

**Petitioner challenging driver's license revocation must file against commissioner of public safety.** — If a petitioner whose license has been revoked is not in physical custody, but alleges that the petitioner's liberty is otherwise restrained, the proper party respondent is not the State of Georgia but rather the commissioner of public safety who, in the exercise of a statutory duty, is restricting the petitioner's liberty. *Hardison v. Martin*, 254 Ga. 719, 334 S.E.2d 161 (1985).

**Dismissal of application for failure to comply with section.** — Since the application for writ of habeas corpus did not comply with the requirements of this

section, the trial court did not err in dismissing the application. *Baker v. Tanner*, 231 Ga. 723, 204 S.E.2d 136 (1974). But see *Mitchell v. Forrester*, 247 Ga. 622, 278 S.E.2d 368 (1981).

**Required service by petitioner in federal custody outside state.** — Habeas corpus petitioner who was challenging Georgia convictions while incarcerated in a federal penitentiary should have filed the petitioner's action against the State of Georgia only, and not against the prison warden; additionally, since the petition did not list the State, but the petitioner's memorandum of law indicated that it was filed against the State, remand was required in order to properly serve the district attorney by regular mail. *Scott v. Wright*, 276 Ga. 12, 573 S.E.2d 49 (2002).

**Service on district attorney.** — Trial court did not err in refusing to dismiss the petitioner's application for a writ of habeas corpus; even assuming that a requirement existed that the district attorney had to be served with a copy of the application, the state failed to timely raise the argument that it applied since it did not set forth the argument either in the state's answer to the petitioner's application or by motion filed before or simultaneously with the answer, and thus the defense of insufficiency of service was waived. *State v. Jaramillo*, 279 Ga. 691, 620 S.E.2d 798 (2005).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, § 98.

**C.J.S.** — 39A C.J.S., Habeas Corpus, § 284 et seq.

## 9-14-46. Custody and production of petitioner.

Custody and control of the petitioner shall be retained by the Department of Corrections or other authority having custody of the petitioner. It shall be the duty of the department or authority to produce the petitioner at such times and places as the court may direct. (Code 1933, § 50-127, enacted by Ga. L. 1967, p. 835, § 3; Ga. L. 1985, p. 283, § 1.)



## JUDICIAL DECISIONS

**This section contemplates custodians other than the Board of Corrections** (now Department of Offender Rehabilitation), including the State Parole Board (now State Board of Pardons and Paroles). *Fox v. Dutton*, 406 F.2d 123 (5th Cir. 1968), cert. denied, 395 U.S. 916, 89 S. Ct. 1764, 23 L. Ed. 2d 229 (1969).

**Commissioner of department need not be joined as party in habeas action.** — As it is the duty of the department

or other authority having custody of a habeas petitioner to produce the petitioner at such times and places as the superior court may direct, it is not necessary that the commissioner of the department be joined as a party in a habeas action. *James v. Hight*, 251 Ga. 563, 307 S.E.2d 660 (1983).

**Cited in** *Heaton v. Lemacks*, 266 Ga. 189, 466 S.E.2d 7 (1996).

## OPINIONS OF THE ATTORNEY GENERAL

**Transfer of applicant from one institution to another.** — Applicant for habeas corpus relief may be transferred from one institution to another, so long as the Board of Corrections (now Department of Offender Rehabilitation) retains the applicant's custody and the applicant is produced at such times and places as the habeas court may direct, subject to the

sole restriction that an applicant for habeas corpus relief becomes ineligible during the pendency of the applicant's application for transfer to a county work camp or other institution or form of restraint not maintained by the Board of Corrections (now Department of Offender Rehabilitation). 1971 Op. Att'y Gen. No. 71-160.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, §§ 106, 159, 160.

## 9-14-47. Time for answer and hearing.

Except as otherwise provided in Code Section 9-14-47.1 with respect to petitions challenging for the first time state court proceedings resulting in a sentence of death, within 20 days after the filing and docketing of a petition under this article or within such further time as the court may set, the respondent shall answer or move to dismiss the petition. The court shall set the case for a hearing on the issues within a reasonable time after the filing of defensive pleadings. (Code 1933, § 50-127, enacted by Ga. L. 1967, p. 835, § 3; Ga. L. 1995, p. 381, § 4.)

**Editor's notes.** — Ga. L. 1995, p. 381, § 1, not codified by the General Assembly, provides that "this Act shall be known and may be cited as the 'Death Penalty Habeas Corpus Reform Act of 1995.'"

Ga. L. 1995, p. 381, § 2, not codified by the General Assembly, provides for legislative intent and purpose for this Act.



## JUDICIAL DECISIONS

**Failure of respondent to file timely answer not grounds for release.** — Failure of the respondent to file an answer within 20 days of the filing of a petition does not provide grounds for release of the prisoner. *Gooding v. Dudley*, 232 Ga. 321, 206 S.E.2d 490 (1974).

**Default judgment in prisoners favor.** — Failure of state to respond to a habeas corpus petition within 20 days as required by this section does not require habeas corpus court to grant a default judgment in the prisoner's favor. *Huddleston v. Ricketts*, 233 Ga. 112, 210 S.E.2d 319 (1974).

**Disobedience of respondent may subject respondent to contempt.** — Disobedience of respondent to writ of habeas corpus requiring the respondent to answer within 20 days may subject the respondent to punishment for contempt, but does not require release of the prisoner. *Bailey v. Baker*, 232 Ga. 84, 205 S.E.2d 278 (1974).

**Late answer held harmless to petitioner.** — Since the petitioner made no

objection to the lateness of an answer, was given time to read the answer, and was afforded an opportunity to prepare and file a traverse to it, no harm to the petitioner appeared from the answer's lateness. *Beavers v. Smith*, 227 Ga. 344, 180 S.E.2d 717 (1971), overruled on other grounds, *Holloway v. Hopper*, 233 Ga. 615, 212 S.E.2d 795 (1975).

**There is no requirement that traverse to respondent's answer state any facts or law.** *Beavers v. Smith*, 227 Ga. 344, 180 S.E.2d 717 (1971), overruled on other grounds, *Holloway v. Hopper*, 233 Ga. 615, 212 S.E.2d 795 (1975).

**Petitioner out-of-state.** — Habeas court erred in failing to hold a hearing on the prisoner's petition for relief; the fact that the prisoner was incarcerated in Florida was of no consequence as the prisoner was responsible for providing the necessary evidence at the hearing or be subject to the same sanctions as could be imposed against any other petitioner for civil relief. *Rickett v. State*, 276 Ga. 609, 581 S.E.2d 32 (2003).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, §§ 102, 154, 155.

**C.J.S.** — 39A C.J.S., Habeas Corpus, §§ 310, 311.

### 9-14-47.1. Petitions challenging for the first time state court proceedings resulting in a death sentence.

(a) In petitions filed under this article challenging for the first time state court proceedings resulting in a death sentence, the provisions of this article shall apply except as specifically provided otherwise in this Code section.

(b) Within ten days of the filing of a petition challenging for the first time state court proceedings resulting in a death sentence, the superior court clerk of the county where the petition is filed shall give written notice to The Council of Superior Court Judges of Georgia of the filing of the petition which shall serve as a request for judicial assistance under paragraph (3) of subsection (b) of Code Section 15-1-9.1. Within 30 days of receipt of such notice, the president of the council shall, under guidelines promulgated by the executive committee of the



council, assign the case to a judge of a circuit other than the circuit in which the conviction and sentence were imposed.

(c) The Council of Superior Court Judges of Georgia shall establish, by uniform court rules, appropriate time periods and schedules applicable to petitions filed on or after January 1, 1996, challenging for the first time state court proceedings resulting in a sentence of death. Such rules shall be adopted by the Supreme Court of Georgia on or before December 31, 1995. Such new time periods and schedules shall include, but specifically not be limited to, the following:

- (1) Respondent’s filing of an answer or motion to dismiss the petition;
- (2) Petitioner’s filing of any amendments to the petition;
- (3) Filing by either party of motions and responses to motions;
- (4) Scheduling and conducting of evidentiary hearings; and
- (5) Date of final order.

(d) In petitions filed under this article challenging for a second or subsequent time a state court proceeding resulting in a death sentence, the petitioner shall not be entitled to invoke any of the provisions set forth in this Code section to delay the proceedings. To the extent the court deems it necessary to have an evidentiary hearing on any such petition, the court shall expedite the proceedings and the time limits shall not exceed those set for initial petitions. (Code 1981, § 9-14-47.1, enacted by Ga. L. 1995, p. 381, § 5; Ga. L. 1996, p. 6, § 9.)

**Cross references.** — Habeas corpus proceedings in death sentence cases — application, Ga. Unif. Sup. Ct. R. 44.1.

**Editor’s notes.** — Ga. L. 1995, p. 381, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Death Penalty Habeas Corpus Reform Act of 1995.’”  
Ga. L. 1995, p. 381, § 2, not codified by the General Assembly, provides for legislative intent and purpose for this Act.

**9-14-48. Hearing; evidence; depositions; affidavits; determination of compliance with procedural rules; disposition.**

(a) The court may receive proof by depositions, oral testimony, sworn affidavits, or other evidence. No other forms of discovery shall be allowed except upon leave of court and a showing of exceptional circumstances.

(b) The taking of depositions or depositions upon written questions by either party shall be governed by Code Sections 9-11-26 through 9-11-32 and 9-11-37; provided, however, that the time allowed in Code Section 9-11-31 for service of cross-questions upon all other parties shall be ten days from the date the notice and written questions are served.



(c) If sworn affidavits are intended by either party to be introduced into evidence, the party intending to introduce such an affidavit shall cause it to be served upon the opposing party at least ten days in advance of the date set for a hearing in the case. The affidavit so served shall include the address and telephone number of the affiant, home or business, if known, to provide the opposing party a reasonable opportunity to contact the affiant; failure to include this information in any affidavit shall render the affidavit inadmissible. The affidavit shall also be accompanied by a notice of the party's intention to introduce it into evidence. The superior court judge considering the petition for writ of habeas corpus may resolve disputed issues of fact upon the basis of sworn affidavits standing by themselves.

(d) The court shall review the trial record and transcript of proceedings and consider whether the petitioner made timely motion or objection or otherwise complied with Georgia procedural rules at trial and on appeal and whether, in the event the petitioner had new counsel subsequent to trial, the petitioner raised any claim of ineffective assistance of trial counsel on appeal; and absent a showing of cause for noncompliance with such requirement, and of actual prejudice, habeas corpus relief shall not be granted. In all cases habeas corpus relief shall be granted to avoid a miscarriage of justice. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence challenged in the proceeding and such supplementary orders as to rearraignment, retrial, custody, or discharge as may be necessary and proper.

(e) A petition, other than one challenging a conviction for which a death sentence has been imposed or challenging a sentence of death, may be dismissed if there is a particularized showing that the respondent has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows by a preponderance of the evidence that it is based on grounds of which he or she could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the respondent occurred. This subsection shall apply only to convictions had before July 1, 2004. (Code 1933, § 50-127, enacted by Ga. L. 1967, p. 835, § 3; Ga. L. 1975, p. 1143, § 2; Ga. L. 1982, p. 786, §§ 2, 4; Ga. L. 1995, p. 381, § 6; Ga. L. 2004, p. 917, § 3.)

**Editor's notes.** — Ga. L. 1982, p. 786, § 5, not codified by the General Assembly, declared that that Act is inapplicable to habeas corpus petitions filed prior to January 1, 1983.

Ga. L. 1995, p. 381, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited

as the 'Death Penalty Habeas Corpus Reform Act of 1995.'"

Ga. L. 1995, p. 381, § 2, not codified by the General Assembly, provides for legislative intent and purpose for this Act.

**Law reviews.** — For annual survey of death penalty law, see 58 Mercer L. Rev. 111 (2006).



## JUDICIAL DECISIONS

**Affidavits or depositions may be used at habeas hearing as primary evidence** even though witnesses' presence may not be required. *Phillips v. Hopper*, 237 Ga. 68, 227 S.E.2d 1 (1976).

When a habeas court found an inmate's claim of ineffective assistance of counsel was not procedurally barred, under O.C.G.A. § 9-14-48(d), for failing to raise the claim on direct appeal because the allegedly ineffective counsel could not, due to illness, attend a hearing held on remand during the inmate's direct appeal and, thus, could not be cross-examined, this was error because, even if the claim was different enough from barred claims to fall within a defaulted-claim analysis, it overlooked the readily available legal remedy of a court order to obtain counsel's sworn testimony for use at the remand hearing, under former O.C.G.A. § 24-10-130 (see now O.C.G.A. § 24-13-130), so counsel's absence from the hearing did not establish cause for failure to raise the ineffective assistance claim. *Schofield v. Meders*, 280 Ga. 865, 632 S.E.2d 369 (2006), cert. denied, 549 U.S. 1126, 127 S. Ct. 958, 166 L.Ed.2d 729 (2007).

**Affidavits may be considered in prisoner habeas corpus cases.** *Harper v. Harper*, 241 Ga. 19, 243 S.E.2d 74 (1978).

**Weighing of evidence.** — Habeas court is authorized to give greater credence to the transcript of evidence at the petitioner's trial than to the petitioner's testimony at a subsequent habeas hearing in resolving disputed issues of fact. *Wilson v. Hopper*, 234 Ga. 859, 218 S.E.2d 573 (1975).

**Alleged incompetency of legal counsel.** — Court considering petitioner's contentions of coercion in pleading guilty, along with incompetence of appointed counsel, supported solely by the petitioner's own testimony, could in the court's discretion give credit to testimony of an attorney, taken upon written interrogatories, and to the transcript of the guilty plea hearing, a copy of which was duly certified and introduced into evidence, and find in accordance with that evidence

rather than in accordance with the testimony of the petitioner. *Crawford v. Caldwell*, 229 Ga. 809, 194 S.E.2d 470 (1972).

**Burden of proof on petitioner.** — Burden is on the petitioner in a habeas corpus proceeding to show that the sentence is invalid. *Perry v. Holland*, 228 Ga. 660, 187 S.E.2d 286 (1972).

Burden is on the petitioner in a habeas proceeding to prove that an alleged violation of the petitioner's constitutional rights did, in fact, occur. *Wilson v. Hopper*, 234 Ga. 859, 218 S.E.2d 573 (1975).

When a petitioner was procedurally barred from raising a claim of jury-bailiff misconduct, the petitioner had the burden to establish actual prejudice and the habeas court erred in placing the burden on the state to show that any error was harmless and in applying the presumption of prejudice. *Turpin v. Todd*, 268 Ga. 820, 493 S.E.2d 900 (1997).

**Petitioner out-of-state.** — Prisoner, incarcerated in Florida, was entitled to have a hearing set on the prisoner's habeas petition, filed in Georgia, since the prisoner was not required to be present at the hearing and could submit evidentiary proof through depositions, oral testimony, sworn affidavits, or other evidence. *Rickett v. State*, 276 Ga. 609, 581 S.E.2d 32 (2003).

**No presumption of prejudice benefit.** — Absent compelling circumstances, a convicted defendant seeking to overcome a procedural bar is not entitled to the benefit of a presumption of prejudice that would otherwise prevail. *Turpin v. Todd*, 268 Ga. 820, 493 S.E.2d 900 (1997).

**Error involving alleged unconstitutionally burden-shifting instruction** did not amount to a "miscarriage of justice" since the jury was well instructed on the state's burden of proving guilt beyond a reasonable doubt. *Gavin v. Vasquez*, 261 Ga. 568, 407 S.E.2d 756 (1991).

**Presumptions in favor of judgment.** — Habeas corpus is a collateral attack on a judgment, sentence, or order, and on habeas proceedings the same presumptions are indulged in favor of the validity of the judgment as are indulged in other



collateral assaults on a judgment. *Porter v. Johnson*, 242 Ga. 188, 249 S.E.2d 608 (1978).

**Application of miscarriage of justice analysis limited.** — Supreme Court has never authorized a habeas court to apply the miscarriage of justice analysis in order to substitute its judgment for that of a court of competent jurisdiction which reviewed identical evidence. *Walker v. Penn*, 271 Ga. 609, 523 S.E.2d 325 (1999).

When the defendant did not seek a jury determination of the defendant's alleged mental retardation, as defined by O.C.G.A. § 17-7-131(a)(3), at the defendant's criminal trial for murder, that issue was procedurally defaulted pursuant to O.C.G.A. § 9-14-48(d); however, the court reviewed the issue under the miscarriage of justice standard and determined that *Ring v. Arizona*, 536 U.S. 584 (2002) did not have a retroactive effect in the defendant's collateral review proceeding instituted after the appeals from the original trial were completed. *Head v. Hill*, 277 Ga. 255, 587 S.E.2d 613 (2003).

Extraordinary exception to the general rule that presumptions of harm that apply on direct appeal do not apply on habeas corpus to procedurally defaulted claims should apply only when dictated by constitutional law or when clearly necessary to avoid a miscarriage of justice under O.C.G.A. § 9-14-48(d). *Perkins v. Hall*, 288 Ga. 810, 708 S.E.2d 335 (2011).

**Failure to raise constitutional issue on appeal.** — When the petitioner failed to raise an allegation of constitutional violations on direct appeal from the resentencing trial and did not raise the allegation until the subsequent state habeas corpus proceeding, the district court correctly determined the issue to be subject to procedural default pursuant to subsection (d) of O.C.G.A. § 9-14-48. *Alderman v. Zant*, 22 F.3d 1541 (11th Cir.), cert. denied, 513 U.S. 1061, 115 S. Ct. 673, 130 L. Ed. 2d 606 (1994).

Defendant's substantive right-to-be-present claim was procedurally defaulted, and the defendant made no assertion of cause and prejudice as might overcome default under O.C.G.A. § 9-14-48(d). *Griffin v. Terry*, 291 Ga. 326, 729 S.E.2d 334 (2012), cert. denied, 133 S. Ct. 765, 184 L. Ed. 2d 506 (2012).

**No right to free transcript of original trial for habeas purposes.** — While an indigent is entitled to a copy of the indigent's trial transcript for a direct appeal of the indigent's conviction, such is not the case in collateral post-conviction proceedings. *Orr v. Couch*, 244 Ga. 374, 260 S.E.2d 82 (1979).

**Right to a trial transcript is tied to the right of appeal,** and once an appeal has been dismissed, the defendant no longer has a right to a trial transcript at state expense. *Yates v. Brown*, 235 Ga. 391, 219 S.E.2d 729 (1975).

**Free transcript of habeas corpus trial shall be furnished to indigent defendants** for appeal in the event the indigent defendants request a transcript. *Harper v. State*, 229 Ga. 843, 195 S.E.2d 26 (1972).

**Reversal and remand of habeas case when no evidentiary hearing held.** — When the defendants were given no evidentiary hearing on application for habeas corpus, a judgment denying relief will be reversed and the case remanded for trial, which trial shall be transcribed by a reporter. *Harper v. State*, 229 Ga. 843, 195 S.E.2d 26 (1972).

**Remand for additional findings and conclusions.** — Inmate's claim that the state presented false testimony required additional findings of fact and conclusions, necessitating remand. *McMichen v. Hall*, 684 S.E.2d 641, 2009 Ga. LEXIS 640 (2009).

**Remand of a habeas proceeding to another superior court was improper.** — Trial court was not authorized to remand a habeas proceeding to another superior court, or to order the filing of an extraordinary motion for new trial in another superior court; a final order transferring the defendant's ineffective assistance of counsel claims to another county was void ab initio as an unauthorized exercise of authority. *Martin v. Astudillo*, 280 Ga. 295, 627 S.E.2d 34 (2006).

**Claim of ignorance of plea consequences inconsistent with invocation to attorney-client privilege.** — When there was no claim of misconduct or incompetent representation, habeas corpus petitioner could not claim that the petitioner was not informed of the sentence



consequences of a guilty plea and then invoke the attorney-client privilege to prevent the attorney from testifying. *Bailey v. Baker*, 232 Ga. 84, 205 S.E.2d 278 (1974).

**Proper cause for failure to raise issue on appeal found.** — Petitioner established cause for the petitioner's failure on appeal to raise a claim of jury-bailiff misconduct at the sentencing phase of the petitioner's trial because the bailiff concealed the facts and there was no evidence that would have alerted trial or appellate counsel to the misconduct. *Turpin v. Todd*, 268 Ga. 820, 493 S.E.2d 900 (1997).

**Remand to custody held only authorized disposition in light of other sentences.** — Since it was unquestioned that detention of the petitioner under sentences from other counties was legal, the trial judge had no authority to make any other disposition of the matter except to remand the petitioner to the custody of the respondent. *Steed v. Ault*, 229 Ga. 649, 193 S.E.2d 851 (1972).

**Denial of a motion for trial severance** does not rise to the level of a claimed "miscarriage of justice." *Gunter v. Hickman*, 256 Ga. 315, 348 S.E.2d 644 (1986).

**Ineffectiveness claim raised at earliest practical moment.** — After counsel notified the defendant that counsel did not believe there were grounds for appeal and sought to dismiss the appeal, and the defendant notified the court that the defendant disagreed with the dismissal and attached copies of the defendant's correspondence with counsel indicating, inter alia, that the defendant particularly objected to the second counsel's failure to raise the ineffectiveness issue, these facts establish that the defendant took steps in perhaps the only manner available to a lay person to see that the issue of ineffectiveness was raised at the earliest practicable moment. *Norman v. State*, 208 Ga. App. 830, 432 S.E.2d 216 (1993).

**Ineffective assistance argument can overcome subsection (d) default.** — Constitutional ineffective assistance of counsel can constitute a sufficient cause to overcome a procedural default under subsection (d) of O.C.G.A. § 9-14-48. *Turpin v. Todd*, 268 Ga. 820, 493 S.E.2d 900 (1997).

Since the trial court did not make a specific finding as to the cause for appellate counsel's failure to raise trial counsel's ineffectiveness, the matter had to be remanded for the defendant to show, pursuant to O.C.G.A. § 9-14-48(d), that appellate counsel's decision to forego that issue was an unreasonable tactical move that no competent attorney in the same situation would have made. *State v. Smith*, 276 Ga. 14, 573 S.E.2d 64 (2002), overruled on other grounds, *Wilkes v. Terry*, 290 Ga. 54, 717 S.E.2d 644 (2011).

**Availability of evidence on direct appeal.** — When a habeas court found an inmate's ineffective assistance claim was not procedurally barred, under O.C.G.A. § 9-14-48(d), for failing to raise the claim on direct appeal because "the factual or legal basis for the claim was not reasonably available to counsel," this was clearly erroneous as to testimony from a detective about other shootings on the night of the murder the inmate was convicted of and a feud allegedly motivating the shooters because the detective actually testified in a remand hearing during the direct appeal of the inmate's conviction, and a number of other witnesses were questioned about the other shooting incidents so the testimony was not unavailable. *Schofield v. Meders*, 280 Ga. 865, 632 S.E.2d 369 (2006), cert. denied, 549 U.S. 1126, 127 S. Ct. 958, 166 L.Ed.2d 729 (2007).

**Failure to make a timely objection to an alleged error or deficiency** will not preclude review by a habeas corpus court when there is a showing of adequate cause for failure to object and a showing of actual prejudice to the accused. Even absent such a showing of cause and prejudice, the relief of the writ will remain available to avoid a miscarriage of justice. *Valenzuela v. Newsome*, 253 Ga. 793, 325 S.E.2d 370 (1985); *Newsome v. Black*, 258 Ga. 787, 374 S.E.2d 733 (1989); *Baxter v. Kemp*, 260 Ga. 184, 391 S.E.2d 754 (1990), cert. denied, 498 U.S. 1041, 111 S. Ct. 714, 112 L. Ed. 2d 703 (1991).

**Twenty year old delay in habeas petition was time-barred.** — Given defendant's 20-year delay in filing a habeas petition, which resulted in total prejudice to the government in the government's ability to respond, and the defendant's



failure to meet defendant's burden of proving a legally valid excuse for not filing the petition sooner, the habeas court did not abuse the court's discretion in dismissing the petition under O.C.G.A. § 9-14-48(e). *Flint v. State*, 288 Ga. 39, 701 S.E.2d 174 (2010).

**When state court both applies procedural bar and addresses claims on merits**, federal habeas review is precluded only if the state court's adjudication on the merits is made in the alternative and does not constitute the principal basis for the state court's denial of relief on collateral challenge of the conviction. *Hardin v. Black*, 845 F.2d 953 (11th Cir. 1988).

**Procedural default.** — Habeas petitioner's mental retardation claim was not subject to procedural default. *Turpin v. Hill*, 269 Ga. 302, 498 S.E.2d 52 (1998), cert. denied, 525 U.S. 969, 119 S. Ct. 418, 142 L. Ed. 2d 340 (1998).

When a trial court granted an inmate's habeas corpus petition based on a seven-year delay between the inmate's conviction and the filing of the direct appeal without finding whether the inmate's procedural default, due to not raising the issue in the direct appeal of the inmate's conviction, was overcome by adequate cause for failing to pursue the issue on appeal and actual prejudice to the inmate, or that there had been a substantial denial of the inmate's constitutional rights and it was necessary to hear the inmate's petition to avoid a miscarriage of justice, the trial court's judgment had to be vacated and the matter had to be remanded to determine if the inmate's procedural default had been overcome. *Chatman v. Mancill*, 278 Ga. 488, 604 S.E.2d 154 (2004).

Inmate was not given leave to amend a habeas corpus petition so as to assert new claims alleging that the indictment was fatally flawed and that the verdict of conviction violated double jeopardy; even if the new claims would have been timely, the amendment would have been futile because a state habeas court denied the claims on the ground that the claims were procedurally defaulted under O.C.G.A. § 9-14-48(d), which constituted an independent and adequate state ground suffi-

cient to preclude federal review. *Evans v. Thompson*, No. 1:04-CV-2866-RWS, 2006 U.S. Dist. LEXIS 12954 (N.D. Ga. Mar. 15, 2006).

Because the habeas court applied the incorrect legal standards in finding the prejudice which was necessary to excuse a procedural default, remand was ordered for that court to determine actual prejudice. *Upton v. Jones*, 280 Ga. 895, 635 S.E.2d 112 (2006).

When a habeas court found an inmate's ineffective assistance claim was not procedurally barred, under O.C.G.A. § 9-14-48(d), for failing to raise the claim on direct appeal because the inmate "did not have access" to testimony from a prosecutor until the habeas hearing, this was clearly erroneous as the prosecutor was present at a remand hearing during the inmate's direct appeal and was thus available to be called as a witness within the trial court's discretion. *Schofield v. Meders*, 280 Ga. 865, 632 S.E.2d 369 (2006), cert. denied, 549 U.S. 1126, 127 S. Ct. 958, 166 L.Ed.2d 729 (2007).

Petitioner's habeas petition was denied because the petitioner was procedurally barred from raising the four grounds enumerated in the petition since the petitioner had raised those same four claims before the state habeas court, which found that the petitioner had not raised those claims at trial or on direct appeal as required by O.C.G.A. § 9-14-48, and the petitioner failed to establish sufficient cause to excuse the procedural default. *Clark v. Williams*, No. 1:07-CV-0103-RWS, 2007 U.S. Dist. LEXIS 73096 (N.D. Ga. Sept. 28, 2007).

Habeas court correctly concluded that the petitioner's claim that the petitioner was tried while incompetent was barred by procedural default under O.C.G.A. § 9-14-48(d) because the claim was not pursued to a conclusion at trial and was not raised on direct appeal; for purposes of determining whether the procedural default doctrine will apply, there is no meaningful distinction between the failure to exercise a defendant's right to have his or her competence determined in the trial court and the failure to exercise a defendant's additional right to have a competency determination evaluated on appeal



and substantive claims of incompetence to stand trial will continue to be subject to procedural default. *Perkins v. Hall*, 288 Ga. 810, 708 S.E.2d 335 (2011).

Habeas court erred in granting a petitioner relief on the ground that the trial court erred when the court refused to instruct the jury on the offense of voluntary manslaughter under O.C.G.A. § 16-5-2(a) when appellate counsel failed to present the question on direct appeal, and neither the petitioner's nor the state's evidence tended to show a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person. *Humphrey v. Lewis*, 291 Ga. 202, 728 S.E.2d 603 (2012).

Habeas court erred in granting a petitioner relief on a Brady claim when the petitioner failed to raise the claim at trial or on direct appeal and failed to establish the requisite prejudice to overcome procedural default under O.C.G.A. § 9-14-48(d). There was no reasonable probability that the result of the trial would have been different had the allegedly suppressed evidence been disclosed to the defense. *Humphrey v. Lewis*, 291 Ga. 202, 728 S.E.2d 603 (2012).

**Counsel not expected to allege own ineffectiveness.** — When an inmate did not raise the issue of an undisclosed conflict of interest of trial counsel on direct appeal, there was no procedural default in a habeas proceeding; trial counsel had also served as counsel on direct appeal, and counsel were not expected to allege their own ineffectiveness on direct appeal. *Gibson v. Head*, 282 Ga. 156, 646 S.E.2d 257 (2007).

**Failure to show pro se status.** — Although the habeas court erred in resting the court's judgment on procedural default, the denial of habeas relief was affirmed because the petitioner could not show from the record that the petitioner was not represented by counsel and that a pro se notice of appeal was legally valid and acted to deprive the trial court of jurisdiction to try the petitioner. *Tolbert v. Toole*, 296 Ga. 357, 767 S.E.2d 24 (2014).

**Failure to disclose Brady information about confidential informant.** — Convicted capital murder defendant's ha-

beas corpus petition was granted, the conviction was reversed, and the defendant was awarded a new trial because the defendant prevailed on a Brady claim that the state failed to disclose that the state had paid a confidential informant money for information that led to the defendant's conviction; the payment of money was exculpatory since it indicated that the informant could be impeached since the informant had a motive to lie. *Schofield v. Palmer*, 279 Ga. 848, 621 S.E.2d 726 (2005).

Defendant did not have to show that the defendant would have been acquitted if the defendant had been able to obtain the Brady information; defendant simply had to show, and did show, that the state's evidentiary suppression undermined confidence in the outcome of the trial. *Schofield v. Palmer*, 279 Ga. 848, 621 S.E.2d 726 (2005).

**Actual prejudice not shown.** — Death row inmate's habeas corpus petition under O.C.G.A. § 9-14-42(a), alleging ineffective assistance of counsel in counsel's failure to secure funds for forensic experts, was unsuccessful because the real issue was one of the inmate's credibility in light of non-forensic evidence that the inmate had raped, harassed, and threatened to kill the inmate's spouse in the past; therefore, the inmate's lack of funds for forensic experts did not prejudice the defense as required by O.C.G.A. § 9-14-48(d). *McMichen v. Hall*, 684 S.E.2d 641, 2009 Ga. LEXIS 640 (2009).

**Procedural bars not found.** — Inmate did not overcome procedural default for alleged ineffective assistance of counsel in a competency trial because counsel's failure to object to the prosecutor's questions about the inmate's refusal to discuss the crimes during mental examinations and the request for counsel before one examination did not change the trial's result because the evidence of the inmate's competence was overwhelming. *Waldrip v. Head*, 279 Ga. 826, 620 S.E.2d 829 (2005).

Inmate did not overcome procedural default by claiming that various documents had been suppressed by the state prior to a murder trial because the inmate did not show any prejudice, as the various docu-



ments either singly or cumulatively, would not have caused a different result in the trial. *Waldrip v. Head*, 279 Ga. 826, 620 S.E.2d 829 (2005).

Defendant's habeas corpus petition based upon the failure to obtain Brady information was not procedurally barred since the defendant tried to obtain that information from the state but was not able to obtain the information until discovery in conjunction with the habeas corpus hearings. *Schofield v. Palmer*, 279 Ga. 848, 621 S.E.2d 726 (2005).

When an inmate claimed, in a habeas corpus petition, that the inmate received ineffective assistance of counsel in a competency trial because of the counsel's failure to object to the prosecutor's comments about the inmate's refusal to discuss the crimes with mental health examiners and the request to consult with counsel, the inmate did not show that, had counsel objected, the result of the trial finding the inmate competent would have changed because the evidence of competency was overwhelming. *Waldrip v. Head*, 2005 Ga. LEXIS 663 (Oct. 11, 2005).

When an inmate claimed, in a habeas corpus petition, that the state had suppressed exculpatory material, the material specified was either inadmissible or, had the material been admitted, would not have changed the outcomes of the competency or criminal trials so the inmate did not overcome the bar of procedural default. *Waldrip v. Head*, 2005 Ga. LEXIS 663 (Oct. 11, 2005).

Inmate's Brady claim within a petition for habeas corpus, based upon the state's failure to produce to the defense audiotapes containing exculpatory witness statements and the inmate's own statement to police during investigation of the crimes, was not procedurally defaulted because the inmate showed cause and prejudice to excuse the default. *Walker v. Johnson*, 282 Ga. 168, 646 S.E.2d 44 (2007).

Because an inmate showed the requisite cause and prejudice from trial counsel's failure to object to the erroneous charge or raise the issue on appeal, the inmate's habeas claim based on the erroneous charge was not procedurally barred by O.C.G.A. § 9-14-48(d). *Hall v. Wheeling*, 282 Ga. 86, 646 S.E.2d 236 (2007).

### **Habeas relief erroneously granted.**

— Inmate was not entitled to habeas corpus relief pursuant to O.C.G.A. § 9-14-48 as application of the modified Barker factors indicated that although the delay prior to trial was excessive, there was no showing that the inmate suffered prejudice, nor that the delay was attributable to the appellate counsel's ineffectiveness; the Georgia Supreme Court agreed that speedy appeal claims arise under the Fifth Amendment and that many of the interests protected under the Sixth Amendment were not implicated when a defendant has already been convicted of an offense. *Chatman v. Mancill*, 280 Ga. 253, 626 S.E.2d 102 (2006).

Because: (1) the habeas court misconstrued O.C.G.A. § 9-14-48(e); (2) a record was not required to affirmatively show that an inmate's 1965 guilty pleas were knowingly and voluntarily entered; and (3) the state was unduly prejudiced by the 38-year delay in filing for habeas relief, the inmate's petition for a writ of habeas corpus was erroneously granted. *Wiley v. Miles*, 282 Ga. 573, 652 S.E.2d 562 (2007).

Habeas court erred by granting a defendant's petition for habeas relief with regard to the defendant's convictions for malice murder and other crimes as no prejudice was shown to overcome the procedural default that existed since the defendant failed to show an alleged Brady violation involved exculpatory evidence; trial counsel's testimony clearly demonstrated that the decision not to call the defendant's alibi witnesses was a fully considered and well reasoned decision under the circumstances as concerns over the witness' credibility existed; and the habeas court's finding that the record was silent on the issue of whether the defendant knowingly and voluntarily waived the defendant's right to testify at trial was clear error since the trial transcript revealed otherwise. *Upton v. Parks*, 284 Ga. 254, 664 S.E.2d 196 (2008).

Habeas court erred by granting the defendant relief and vacating the defendant's death sentence for murder as the defendant failed to show that the defense was prejudiced by trial counsel rendering insufficient evidence that the defendant was mentally ill. Further, the defendant



failed to show that the defense was prejudiced by trial counsel’s failure to object to alleged inappropriate comments made by the prosecutor. *Hall v. Brannan*, 284 Ga. 716, 670 S.E.2d 87 (2008).

**Cited in** *Brawner v. Smith*, 225 Ga. 296, 167 S.E.2d 753 (1969); *House v. Stynchcombe*, 239 Ga. 222, 236 S.E.2d 353 (1977); *Reeves v. Allen*, 242 Ga. 696, 251 S.E.2d 286 (1978); *Maddox v. Seay*, 243 Ga. 793, 256 S.E.2d 904 (1979); *Pulliam v. Balkcom*, 245 Ga. 99, 263 S.E.2d 123 (1980); *Mulligan v. Zant*, 531 F. Supp. 458 (M.D. Ga. 1982); *Birt v. Montgomery*, 709 F.2d 690 (11th Cir. 1983); *Moore v. Kemp*, 254 Ga. 279, 328 S.E.2d 725 (1985); *Baxter v. Kemp*, 260 Ga. 184, 391 S.E.2d 754 (1990); *Goodwin v. Cruz-Padillo*, 265

Ga. 614, 458 S.E.2d 623 (1995); *Roulain v. Martin*, 266 Ga. 353, 466 S.E.2d 837 (1996); *Turpin v. Christenson*, 269 Ga. 226, 497 S.E.2d 216 (1998); *Parker v. Turpin*, 60 F. Supp. 2d 1332 (N.D. Ga. 1999); *Byrd v. Owen*, 272 Ga. 807, 536 S.E.2d 736 (2000); *Head v. Carr*, 273 Ga. 613, 544 S.E.2d 409 (2001); *Head v. Ferrell*, 274 Ga. 399, 554 S.E.2d 155 (2001); *Stanford v. Stewart*, 274 Ga. 468, 554 S.E.2d 480 (2001); *Crawford v. Head*, 311 F.3d 1288 (11th Cir. 2002); *Ford v. Schofield*, 488 F. Supp. 2d 1258 (N.D. Ga. 2007); *Walker v. Hale*, 283 Ga. 131, 657 S.E.2d 227 (2008); *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 658 S.E.2d 603 (2008); *Sherman v. City of Atlanta*, 293 Ga. 169, 744 S.E.2d 689 (2013).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, §§ 107, 117, 161.

**C.J.S.** — 39A C.J.S., Habeas Corpus, §§ 322 et seq., 333 et seq.

9-14-49. Findings of fact and conclusions of law.

After reviewing the pleadings and evidence offered at the trial of the case, the judge of the superior court hearing the case shall make written findings of fact and conclusions of law upon which the judgment is based. The findings of fact and conclusions of law shall be recorded as part of the record of the case. (Code 1933, § 50-127, enacted by Ga. L. 1967, p. 835, § 3.)

**Cross references.** — Ruling on petition, Ga. Unif. Sup. Ct. R. 44.12.

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**This section simply requires the trial judge to set out the judge’s findings of fact**, showing a consideration of the facts of the case and a determination in relation to these facts. *Day v. Mills*, 224 Ga. 741, 164 S.E.2d 828 (1968).

**This section does not require the trial court at a habeas hearing to set forth each fact** upon which the court bases the court’s finding, as these facts appear in the record, and no useful purpose would be accomplished by having the trial judge repeat them. *Day v. Mills*, 224 Ga. 741, 164 S.E.2d 828 (1968).

This section does not require trial court at a habeas corpus hearing to set forth each fact upon which the court bases its finding. *Brown v. Holland*, 228 Ga. 628, 187 S.E.2d 246 (1972), overruled on other grounds, *Hall v. Hopper*, 234 Ga. 625, 216 S.E.2d 839 (1975).

**Remand for finding not authorized.** — O.C.G.A. § 9-14-49 did not authorize the superior court in a habeas corpus proceeding to remand the proceeding to another superior court for a finding as to whether the defendant voluntarily made a statement to a prison official which was



used in cross-examination at the defendant's trial. *Newsome v. Black*, 258 Ga. 787, 374 S.E.2d 733 (1989).

**Remand of a habeas proceeding to another superior court was improper.**

— Trial court was not authorized to remand a habeas proceeding to another superior court, or to order the filing of an extraordinary motion for new trial in another superior court; a final order transferring the defendant's ineffective assistance of counsel claims to another county was void ab initio as an unauthorized exercise of authority. *Martin v. Astudillo*, 280 Ga. 295, 627 S.E.2d 34 (2006).

**Ruling that no rights were violated and that trial was fair held sufficient.**

— Trial court makes sufficient findings of fact by expressly ruling as a matter of fact that none of the petitioner's constitutional rights have been violated by the arresting officers, and that the petitioner has had a fair and legal trial. *Brown v. Holland*, 228 Ga. 628, 187 S.E.2d 246 (1972), overruled on other grounds, *Hall v. Hopper*, 234 Ga. 625, 216 S.E.2d 839 (1975).

**Adoption of prior ruling held adequate.** — When the trial court referred in habeas corpus proceeding to the records admitted in the prior proceeding, and at least by implication, adopted the court's prior ruling on dismissal of the criminal appeal, the trial court complied with this section. *McAuliffe v. Rutledge*, 231 Ga. 1, 200 S.E.2d 100 (1973).

**Cursory oral ruling embodying finding that no rights violated.** — Oral

ruling that was cursory and not in compliance with the exact language of this section, but nonetheless embodied a finding that none of the petitioner's constitutional rights were violated, did not constitute reversible error. *Bailey v. Baker*, 232 Ga. 84, 205 S.E.2d 278 (1974).

**Judge's finding not disturbed if supported by any evidence.** — On trial of a habeas corpus case, the judge is the trier of both the law and the facts, and if there is any evidence to support the finding of the trial court, even though there is evidence to the contrary, such finding will not be disturbed. *Williams v. Caldwell*, 229 Ga. 453, 192 S.E.2d 378 (1972).

**Insufficient order denying relief.** — Judgment denying an appellant's request for habeas relief was vacated and the case was remanded because the order denying relief contained no indication of the facts or law on which the trial court based the court's decision and therefore failed to meet the requirements of O.C.G.A. § 9-14-49. *Thomas v. State*, 284 Ga. 327, 667 S.E.2d 375 (2008), overruled on other grounds, *Crosson v. Conway*, 291 Ga. 220, 728 S.E.2d 617 (2012).

**Cited in** *White v. Gnann*, 225 Ga. 398, 169 S.E.2d 301 (1969); *Stynchcombe v. Walden*, 226 Ga. 63, 172 S.E.2d 402 (1970); *Law v. Smith*, 226 Ga. 298, 174 S.E.2d 893 (1970); *Hughes v. Sikes*, 273 Ga. 804, 546 S.E.2d 518 (2001); *Greer v. Thompson*, 281 Ga. 419, 637 S.E.2d 698 (2006); *In re Baucom*, 297 Ga. App. 661, 678 S.E.2d 118 (2009).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, § 163.

**C.J.S.** — 39A C.J.S., Habeas Corpus, § 368 et seq.

## 9-14-50. Transcription of proceedings.

All trials held under this article shall be transcribed by a court reporter designated by the superior court hearing the case. (Code 1933, § 50-127, enacted by Ga. L. 1967, p. 835, § 3.)



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Cited in *Hilliard v. Hilliard*, 243 Ga. 424, 254 S.E.2d 372 (1979).

## OPINIONS OF THE ATTORNEY GENERAL

This section would not require a transcript of "mental illness" habeas corpus proceedings. 1967 Op. Att'y Gen. No. 67-320.

## RESEARCH REFERENCES

C.J.S. — 39A C.J.S., Habeas Corpus, §§ 354, 355.

### 9-14-51. Effect of failure to raise grounds for relief in original or amended petition.

All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of this state otherwise requires or unless any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition. (Code 1933, § 50-127, enacted by Ga. L. 1967, p. 835, § 3; Ga. L. 1973, p. 1315, § 1.)

## JUDICIAL DECISIONS

**Purpose of this section** is to discontinue practice of filing multiple habeas corpus petitions under a single conviction. *Hunter v. Brown*, 236 Ga. 168, 223 S.E.2d 145 (1976).

**Pro se petitioners.** — Georgia's procedural default rule does not provide an exception to the rule's requirements for pro se prisoners. *McCoy v. Newsome*, 953 F.2d 1252 (11th Cir.), cert. denied, 504 U.S. 944, 112 S. Ct. 2283, 119 L. Ed. 2d 208 (1992).

**One review on merits sufficient.** — One review on the merits, whether on habeas corpus or on appeal of conviction, is sufficient when neither facts nor law has changed. *Brown v. Ricketts*, 233 Ga. 809, 213 S.E.2d 672 (1975).

**Alternative ruling on the merits.** — As long as a state court explicitly invokes a state procedural bar rule as a separate basis for a decision, an alternative ruling

on the merits does not preclude the federal courts from applying the state procedural bar. *Alderman v. Zant*, 22 F.3d 1541 (11th Cir.), cert. denied, 513 U.S. 1061, 115 S. Ct. 673, 130 L. Ed. 2d 606 (1994).

**Failure to raise issue in first petition waives issue on second petition.**

— When the defendant did not raise any challenge to the defendant's grand or traverse juries prior to trial or in the defendant's first habeas petition, nor did the defendant ever raise any question as to the competency of the defendant's trial counsel or the defendant's first habeas corpus, the habeas court upon the second petition did not err in refusing to hear the merits of the claim that women were under-represented on grand and petit jury panels. *Smith v. Zant*, 250 Ga. 645, 301 S.E.2d 32, cert. denied, 464 U.S. 807, 104 S. Ct. 55, 78 L. Ed. 2d 74 (1983).

When the petitioner committed a proce-



dural default when the petitioner failed to assert an ineffective assistance of counsel claim in the petitioner's first habeas proceeding, preferring to stand on the petitioner's claim of attorney-client privilege, absent a showing of cause and prejudice, the petitioner was subsequently barred from bringing the claim in a federal habeas corpus proceeding. *Morris v. Kemp*, 809 F.2d 1499 (11th Cir.), cert. denied, 482 U.S. 907, 107 S. Ct. 2486, 96 L. Ed. 2d 378 (1987).

Under the precedents existing at the time of a petitioner's first habeas petition, a claim that the petitioner could not be convicted of aggravated stalking based solely on a single violation of a protective order could have been raised based on the language of O.C.G.A. §§ 16-5-90(a)(1) and 16-5-91(a); therefore, the petitioner's second petition was barred by O.C.G.A. § 9-14-51. *State v. Cusack*, 296 Ga. 534, 769 S.E.2d 370 (2015).

**Court to determine whether matter could "reasonably have been raised" before.** — Petitioner who failed to allege a violation in the petitioner's original state petition is not barred from raising the violation in state court until a state court judge considers the subsequent petition and decides the matter could "reasonably have been raised" before. *Cherry v. Director, State Bd. of Cors.*, 613 F.2d 1262 (5th Cir. 1980), cert. denied, 454 U.S. 840, 102 S. Ct. 150, 70 L. Ed. 2d 124 (1981).

**When counsel's failure to assert grounds contravened client's wishes.** — Individual did not waive rights to a habeas corpus proceeding when, contrary to the individual's wishes and the individual's counsel's assurance, counsel failed to assert grounds for habeas corpus in the preceding hearing. *Smith v. Garner*, 236 Ga. 81, 222 S.E.2d 351 (1976), later appeal, *State Bd. of Cors. v. Smith*, 238 Ga. 565, 233 S.E.2d 797 (1977).

**Appeal on newly asserted ground held meritless.** — When it appeared that the petitioner was fully apprised of the provisions of this section, and there was a total absence of any explanation on the petitioner's part to afford the trial judge any basis for determining that the petitioner had not previously deliberately

withheld a newly asserted ground, the petitioner's appeal was without merit. *Reese v. Ault*, 229 Ga. 694, 194 S.E.2d 79 (1972).

**Relitigation of ineffective assistance claim allowed.** — When a petitioner calls the state court's attention to ineffective assistance problems and the court examines the crucial aspect of counsel's representation, the petitioner may relitigate the constitutional claim in federal court, though the petitioner failed to specify counsel's closing argument as a ground supporting the petitioner's ineffective assistance claim. *Francis v. Spraggins*, 720 F.2d 1190 (11th Cir. 1983), cert. denied, 470 U.S. 1059, 105 S. Ct. 1776, 84 L. Ed. 2d 835 (1985).

**Cause for failure to raise ineffective assistance issue.** — There was "cause" for petitioner's failure to raise the ineffective assistance issue in the petitioner's first state habeas petition in the fact that the petitioner's trial counsel, whose effectiveness is challenged in federal proceedings, also represented the petitioner in the first state habeas proceeding, and such counsel's failings caused petitioner to suffer an "actual and substantial disadvantage," thus constituting the "prejudice" that must be established before a procedurally defaulted claim may be heard by a federal habeas court. *Stephens v. Kemp*, 846 F.2d 642 (11th Cir.), cert. denied, 488 U.S. 872, 109 S. Ct. 189, 102 L. Ed. 2d 158 (1988).

**Conflict of interest of trial counsel.** — On a second habeas petition when an inmate claimed that trial counsel had simultaneously served as a special assistant attorney general, it was error to assume that the inmate could have discovered the conflict before filing the inmate's first habeas petition; the inmate was entitled to presume that trial counsel did not have an undisclosed conflict of interest as trial counsel had a duty to disclose the conflict under O.C.G.A. § 45-15-30 and had a clear ethical duty to do so. *Gibson v. Head*, 282 Ga. 156, 646 S.E.2d 257 (2007).

**Consideration claims denied although courts did not expressly apply this section.** — When neither the Georgia Supreme Court nor the superior



court expressly addressed the application of O.C.G.A. § 9-14-51 to the ineffective assistance issues which a defendant had failed to raise in the defendant's first state habeas petition, and the defendant did not challenge the finding that the defendant's ineffective assistance of counsel claims were ruled on in the defendant's original habeas petition, so the Supreme Court relied on the uncontested finding and barred consideration of the defendant's ineffective assistance claims without reaching the express application of § 9-14-51, then the Georgia court's subsequent application of that section was not inconsistent to bar consideration of the ineffective assistance claims raised in the defendant's second state petition. *Stevens v. Zant*, 968 F.2d 1076 (11th Cir. 1992), cert. denied, 507 U.S. 929, 113 S. Ct. 1306, 122 L. Ed. 2d 695 (1993).

**Claim of erroneous psychiatric evaluation.** — Capital defendant's claim that the defendant was subject to an erroneous psychiatric evaluation was procedurally barred on habeas appeal because the defendant did not raise the claim in the defendant's first or second state habeas corpus petitions. *Burger v. Zant*, 984 F.2d 1129 (11th Cir. 1993), cert. denied, 510 U.S. 847, 114 S. Ct. 141, 126 L. Ed. 2d 104 (1993).

**Claim of sequestration violation not sufficiently raised.** — As to any claim by petitioner death row inmate that two witnesses violated the rule of sequestration or that the testimony of those two witnesses and a third was fabricated, those claims were procedurally barred under O.C.G.A. § 9-14-51 as the claims were not raised on direct appeal or in the petitioner's state habeas corpus petition when the inmate alleged only that the third witness violated the rule of sequestration. *Jefferson v. Terry*, 490 F. Supp. 2d 1261 (N.D. Ga. 2007), aff'd in part and rev'd in part, 570 F.3d 1283 (11th Cir. Ga. 2009).

**Basis for procedural default of federal habeas corpus.** — Death row inmate was not entitled to federal habeas relief pursuant to 28 U.S.C. § 2254 on the inmate's claims that racial animosity led trial counsel to conceal the state's offer of a life sentence, thus providing ineffective assistance under U.S. Const., amend. 6,

and leading to the imposition of the death penalty in violation of U.S. Const., amend. 8; both claims were procedurally barred from federal review since the state trial court found the Sixth Amendment claim res judicata pursuant to O.C.G.A. § 9-14-51 and relied upon Georgia procedural rules in denying the inmate relief on the Eighth Amendment claim; in any event, neither claim had merit. *Osborne v. Terry*, 466 F.3d 1298 (11th Cir. 2006), cert. denied, 552 U.S. 841, 128 S. Ct. 84, 169 L. Ed. 2d 64 (2007).

In a federal habeas case in which an inmate exhausted seven of the eight claims of ineffective assistance of appellate counsel in a state habeas proceeding, but the inmate failed to exhaust the eighth claim, that claim was procedurally defaulted under O.C.G.A. § 9-14-51. *Ogle v. Johnson*, 488 F.3d 1364 (11th Cir. 2007).

O.C.G.A. § 9-14-51 bars adjudication of issues that could have been raised in an original or amended habeas petition; petitioner had six months between the withdrawal of an extraordinary motion for new trial and a ruling on a third state habeas petition to assert an ineffective assistance of counsel claim but failed to do so; therefore, the petitioner failed to exhaust this claim. As the claim was unexhausted, the federal habeas court had to treat the claim as procedurally defaulted. *Mize v. Hall*, 532 F.3d 1184 (11th Cir. 2008), overruled on other grounds, 285 Ga. 24, 673 S.E.2d 227 (2009).

Georgia's procedural default rule, O.C.G.A. § 9-14-51, was inadequate to bar federal review of the inmate's mental retardation claim because the statute had not been consistently and regularly followed. *Conner v. Hall*, 645 F.3d 1277 (11th Cir. 2011).

**Issue of right to counsel not raised as ground for habeas corpus relief.** —

While a respondent was entitled to counsel on a motion to withdraw a guilty plea to aggravated assault but proceeded pro se on an appeal of the denial of that motion, the issue of the right to counsel was never raised as a ground for habeas corpus relief as required by O.C.G.A. §§ 9-14-44 and 9-14-51 and, thus, the respondent was improperly granted a writ of habeas corpus. *Murrell v. Young*, 285 Ga. 182, 674 S.E.2d 890 (2009).



**Cited** in *Brown v. Smith*, 230 Ga. 661, 198 S.E.2d 672 (1973); *Bloodworth v. Hopper*, 539 F.2d 1382 (5th Cir. 1976); *Jarrell v. Zant*, 248 Ga. 492, 284 S.E.2d 17 (1981); *Blake v. Zant*, 513 F. Supp. 772 (S.D. Ga. 1981); *Crane v. State*, 249 Ga. 501, 292 S.E.2d 67 (1982); *Dix v. Zant*, 249 Ga. 810, 294 S.E.2d 527 (1982); *Williams v. State*, 251 Ga. 83, 303 S.E.2d 111 (1983); *Brown v. Francis*, 254 Ga. 83, 326 S.E.2d 735 (1985); *Stevens v. Kemp*, 254 Ga. 228, 327 S.E.2d 185 (1985); *Moore v. Kemp*, 254 Ga. 279, 328 S.E.2d 725 (1985); *Tucker v. Kemp*, 256 Ga. 571, 351 S.E.2d 196 (1987); *Presnell v. Kemp*, 835 F.2d 1567 (11th Cir. 1988); *Jones v. Kemp*, 706 F. Supp. 1534

(N.D. Ga. 1989); *Smith v. Newsome*, 876 F.2d 1461 (11th Cir. 1989); *Lancaster v. Newsome*, 880 F.2d 362 (11th Cir. 1989); *Gaither v. Sims*, 259 Ga. 807, 387 S.E.2d 889 (1990); *High v. Turpin*, 14 F. Supp. 2d 1358 (S.D. Ga. 1998); *Collier v. Turpin*, 177 F.3d 1184 (11th Cir. 1999); *Putman v. Turpin*, 53 F. Supp. 2d 1285 (M.D. Ga. 1999); *Parker v. Turpin*, 60 F. Supp. 2d 1332 (N.D. Ga. 1999); *Mincey v. Head*, 206 F.3d 1106 (11th Cir. 2000); *Spivey v. Head*, 207 F.3d 1263 (11th Cir. 2000); *Ford v. Schofield*, 488 F. Supp. 2d 1258 (N.D. Ga. 2007); *Tolbert v. Toole*, 296 Ga. 357, 767 S.E.2d 24 (2014).

### RESEARCH REFERENCES

**ALR.** — Denial of relief to prisoner on habeas corpus as bar to second application, 161 ALR 1331.

### **9-14-52. Appeal procedure; application to Supreme Court by petitioner for certificate of probable cause; effect of appeal by respondent.**

(a) Appeals in habeas corpus cases brought under this article shall be governed by Chapter 6 of Title 5 except that as to final orders of the court which are adverse to the petitioner no appeal shall be allowed unless the Supreme Court of this state issues a certificate of probable cause for the appeal.

(b) If an unsuccessful petitioner desires to appeal, he must file a written application for a certificate of probable cause to appeal with the clerk of the Supreme Court within 30 days from the entry of the order denying him relief. The petitioner shall also file within the same period a notice of appeal with the clerk of the concerned superior court. The Supreme Court shall either grant or deny the application within a reasonable time after filing. In order for the Supreme Court to consider fully the request for a certificate, the clerk of the concerned superior court shall forward, as in any other case, the record and transcript, if designated, to the clerk of the Supreme Court when a notice of appeal is filed. The clerk of the concerned superior court need not prepare and retain and the court reporter need not file a copy of the original record and a copy of the original transcript of proceedings. The clerk of the Supreme Court shall return the original record and transcript to the clerk of the concerned superior court upon completion of the appeal if the certificate is granted. If the Supreme Court denies the application for a certificate of probable cause, the clerk of the Supreme Court shall



return the original record and transcript and shall notify the clerk of the concerned superior court and the parties to the proceedings below of the determination that probable cause does not exist for appeal.

(c) If the trial court finds in favor of the petitioner, no certificate of probable cause need be obtained by the respondent as a condition precedent to appeal. A notice of appeal filed by the respondent shall act as a supersedeas and shall stay the judgment of the superior court until there is a final adjudication by the Supreme Court; provided, however, that, while such case is on appeal, the petitioner may be released on bail as is provided in criminal cases except when the petitioner has been convicted of a crime which the Supreme Court has jurisdiction to consider on direct appeal. The right to bail and the amount of bond shall be within the discretion of the judge of the superior court in which the sentence successfully challenged under this article was originally imposed. (Code 1933, § 50-127, enacted by Ga. L. 1967, p. 835, § 3; Ga. L. 1975, p. 1143, § 3.)

**Editor's notes.** — Ga. L. 1979, p. 619, § 6, which Act amended § 5-6-34 and

added § 5-6-35, provided that the 1979 Act would not affect this section.

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**Constitution gives General Assembly authority to enact laws placing conditions on appeals.** *Reed v. Hopper*, 235 Ga. 298, 219 S.E.2d 409 (1975).

**Constitutionality.** — Provision that this court may refuse to entertain a habeas corpus appeal for lack of probable cause is not unconstitutional. *Reed v. Hopper*, 235 Ga. 298, 219 S.E.2d 409 (1975).

Habeas corpus judgment adverse to the warden reverses sentence already imposed and presumed to be legal, and requires further proceedings by the state, while judgment adverse to the prisoner reaffirms such sentence; under these circumstances, giving the warden a right to appeal and giving the prisoner the right to appeal upon a showing of probable cause is not a denial of equal protection of the law. *Reed v. Hopper*, 235 Ga. 298, 219 S.E.2d 409 (1975).

**Intent of 1975 amendment.** — Legislative intent in passing the 1975 amendment to this section (Ga. L. 1975, p. 1143, § 3) was to require judicial certification of probable cause as a prerequisite to appeal in a habeas case decided adversely to the petitioner and to establish the procedure for obtaining such certification and for

pursuing such appeal. *Reed v. Hopper*, 235 Ga. 298, 219 S.E.2d 409 (1975).

**Application of Ga. Unif. Super. Ct. R. 33.9.** — On appeal by the state of an order granting an inmate habeas relief, the order was reversed because that inmate acknowledged, in a plea form, that by pleading guilty, the inmate was waiving a constitutional right to a jury trial; moreover, although Ga. Unif. Super. Ct. R. 33.9 applied in a guilty plea hearing, that rule did not apply to the inmate's case because it was not of a constitutional magnitude. *State v. Cooper*, 281 Ga. 63, 636 S.E.2d 493 (2006).

**Time limits.** — While O.C.G.A. § 9-14-52(a) provides that appeals in habeas corpus cases shall be governed by the Appellate Practice Act (Act), O.C.G.A. § 5-6-30 et seq., that provision only means that appeals in habeas corpus cases, once begun, are to be handled in the same way as other civil appeals, and the Act does not provide for every single act involved in an appeal as there is no provision in the Act for computing time limits, and it is necessary to supplement the provisions of the Act by reference to O.C.G.A. § 9-11-6. *Head v. Thomason*, 276



Ga. 434, 578 S.E.2d 426, cert. denied, 540 U.S. 957, 124 S. Ct. 409, 157 L. Ed. 2d 294 (2003).

When an inmate appealed a habeas court's original order granting the inmate a new appeal in the inmate's criminal case, and the state failed to file a cross-appeal from that original order, the state was not allowed to pursue an appeal of the habeas court's later order on remand granting the inmate a new trial; the merits of the issue were reached and resolved in the habeas court's earlier final order and the state's attempt to challenge those merits in the instant appeal was untimely. *Stewart v. Milliken*, 277 Ga. 659, 593 S.E.2d 344 (2004).

Because the inmate sent an application for a certificate of probable cause to the wrong court, the application arrived at the Supreme Court of Georgia after the 30-day deadline; as such, the inmate's federal habeas petition was not timely based on statutory tolling. *Spottsville v. Terry*, 476 F.3d 1241 (11th Cir. 2007).

**Mailbox rule did not apply.** — Pro se petition for habeas corpus was untimely because the petition was received by the habeas court one day after the statutory deadline of O.C.G.A. § 9-14-42(c)(1). The habeas court erred in applying the mailbox rule, under which the filing of a pro se petitioner's notice of appeal was deemed filed when delivered to prison officials, because the mailbox rule applied only to an attempted appeal of a pro se habeas petitioner operating under O.C.G.A. § 9-14-52, not to the filing of the initial petition. *Roberts v. Cooper*, 286 Ga. 657, 691 S.E.2d 875 (2010).

**Compliance with requirements jurisdictional.** — Unsuccessful petitioner for habeas corpus must timely file both a notice of appeal and an application for a certificate of probable cause in order to invoke the jurisdiction of the Supreme Court. *Fullwood v. Sivley*, 271 Ga. 248, 517 S.E.2d 511 (1999).

**Right to directly appeal denial of motion for bail.** — Defendant has the right to directly appeal the denial of a motion for bail pending an appeal and, to the extent that *Bailey v. State*, 259 Ga. 340 (380 SE2d 264) (1989), is contrary, the Supreme Court of Georgia overrules that

case. *Humphrey v. Wilson*, 282 Ga. 520, 652 S.E.2d 501 (2007).

When a prisoner, who is proceeding pro se, appeals from a decision on the prisoner's habeas corpus petition, under O.C.G.A. § 9-14-52 (b), the prisoner's application for a certificate of probable cause to appeal and notice of appeal is deemed filed on the date the prisoner delivers them to the prison authorities for forwarding to the clerks of the supreme court and the superior court, respectively. *Massaline v. Williams*, 274 Ga. 552, 554 S.E.2d 720 (2001).

Pursuant to 28 U.S.C. § 2254(c), the district court properly concluded that a state prisoner's habeas petition alleging ineffective assistance of state appellate counsel was procedurally barred when the prisoner had not applied for a certificate of probable cause to appeal the denial of the prisoner's state habeas petition to the Georgia Supreme Court as allowed under O.C.G.A. § 9-14-52 and, as a result, the prisoner had not exhausted all available state remedies. *Pope v. Rich*, 358 F.3d 852 (11th Cir. 2004).

**Motions to vacate judgments in criminal cases** are not normally treated as petitions for habeas corpus subject to appeal to the Supreme Court. *Martin v. State*, 240 Ga. 488, 241 S.E.2d 246 (1978).

**Appeal from habeas judgment remanding petitioner to custody not mooted by parole.** — Fact that petitioner has been paroled and is serving the balance of the petitioner's sentence on parole does not moot an appeal from a habeas corpus judgment remanding the petitioner to custody. *Morgan v. Kiff*, 230 Ga. 277, 196 S.E.2d 445 (1973), overruled on other grounds, *Jacobs v. Hopper*, 238 Ga. 461, 233 S.E.2d 169 (1977).

**Pretrial habeas corpus proceedings.** — Certificate of probable cause not prerequisite for appeal in pretrial habeas corpus proceedings filed by the petitioner while in custody in lieu of bond pending trial on criminal charges. *Reed v. Stynchcombe*, 249 Ga. 344, 290 S.E.2d 469 (1982).

**Petition seeking relief from driver's license revocation.** — Requirement for an application for a certificate of probable cause extends to habeas corpus peti-



tions seeking relief from a driver's license revocation. *Patterson v. Earp*, 257 Ga. 729, 363 S.E.2d 248 (1988).

**Improper transcript retention against indigent prisoner.** — When the habeas court has assessed costs against an indigent prisoner/petitioner, and the prisoner/petitioner has shown that the prisoner/petitioner is unable to pay those costs by filing in forma pauperis, the clerk of the superior court must forward to the Supreme Court the record and transcript of the habeas proceeding on the filing of the notice of appeal. *Brand v. Szabo*, 263 Ga. 119, 428 S.E.2d 325 (1993).

**Trial court lacked jurisdiction to grant bail.** — Trial court exceeded the court's authority by granting bail to the inmate who sought a writ of habeas corpus; as the challenged sentence was originally imposed in a trial court of a different county, under O.C.G.A. § 9-14-52(c), only that court had authority to grant or deny the inmate's bail. *O'Donnell v. Durham*, 275 Ga. 860, 573 S.E.2d 23 (2002).

**Motion for a new trial.** — When defendant's extraordinary motion for new trial was construed as a petition for a writ of habeas corpus, the issue of appellate counsel's ineffectiveness was directly appealable by the state pursuant to O.C.G.A. § 9-14-52(c). *State v. Smith*, 276 Ga. 14, 573 S.E.2d 64 (2002), overruled on other grounds, *Wilkes v. Terry*, 290 Ga. 54, 717 S.E.2d 644 (2011).

**Transfer to Georgia Supreme Court not possible when trial court lacked jurisdiction.** — Trial court's order denying the defendant's extraordinary motion for new trial/habeas petition was a nullity and void under O.C.G.A. § 9-12-16, and the appellate court could not transfer the defendant's case to the Georgia Supreme Court to consider the grant of a certificate of probable cause under O.C.G.A. § 9-14-52(b), even though the Georgia Supreme Court had exclusive jurisdiction over habeas cases as the trial court was without subject matter jurisdiction to entertain the defendant's habeas claim upon a transfer from a habeas court with in-

structions to determine whether trial counsel was ineffective; however, as the defendant's habeas claims had not been addressed by a court of competent jurisdiction, the appellate court remanded the matter to the habeas court for resolution of the defendant's habeas claims of ineffective assistance of counsel with the final order subject to the appellate procedures outlined in § 9-14-52. *Herrington v. State*, 265 Ga. App. 454, 594 S.E.2d 682 (2004).

**Cross-appeal of claims not ruled upon.** — Prisoner's ineffective-assistance-of-counsel claim under 28 U.S.C. § 2254 was improperly found procedurally barred because the claim was not firmly established under O.C.G.A. § 5-6-38 or O.C.G.A. § 9-14-52 and was not a regularly followed state practice for a prisoner to cross appeal claims upon which a state habeas court did not rule when the prisoner was successful on the prisoner's other state habeas claim. *Mancill v. Hall*, 545 F.3d 935 (11th Cir. 2008).

**Failure to notify appellant of proper procedure for appeal.** — Compliance with O.C.G.A. § 9-14-52(b) cannot be excused for failure to abide by a judicially imposed rule that the habeas petitioner be informed of that statute's requirements. Accordingly, the Supreme Court of Georgia hereby overrules *Hicks v. Scott*, 273 Ga. 358 (2001) and its progeny, including *Thomas v. State*, 284 Ga. 327 (2008) and *Capote v. Ray*, 276 Ga. 1 (2002). *Crosson v. Conway*, 291 Ga. 220, 728 S.E.2d 617 (2012).

**Cited in** *Austin v. Carter*, 248 Ga. 775, 285 S.E.2d 542 (1982); *Smith v. Zant*, 250 Ga. 645, 301 S.E.2d 32 (1983); *Williams v. State*, 251 Ga. 83, 303 S.E.2d 111 (1983); *Baxter v. Kemp*, 260 Ga. 184, 391 S.E.2d 754 (1990); *Brasuell v. State*, 243 Ga. App. 176, 531 S.E.2d 732 (2000); *Ray v. Barber*, 273 Ga. 856, 548 S.E.2d 283 (2001); *Collins v. State*, 277 Ga. 586, 591 S.E.2d 820 (2004); *Martin v. Barrett*, 279 Ga. 593, 619 S.E.2d 656 (2005); *Murrell v. Ricks*, 280 Ga. 427, 627 S.E.2d 546 (2006); *Hall v. Wheeling*, 282 Ga. 86, 646 S.E.2d 236 (2007).



### OPINIONS OF THE ATTORNEY GENERAL

**Superior court clerk has qualified immunity only** in carrying out the clerk's ministerial duties in filing and disbursing of record and transcript of habeas corpus case on appeal under subsection (b) of O.C.G.A. § 9-14-52. 1981 Op. Att'y Gen. No. U81-9.

**Superior court may, by local rule, direct clerk to require and maintain**

**additional copy of record** and transcript of habeas corpus case on appeal under subsection (b) of O.C.G.A. § 9-14-52, and the cost of the additional transcript copy, in cases proceeding in forma pauperis, may be charged to the respondent. 1981 Op. Att'y Gen. No. U81-9.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies, §§ 108, 118, 169 et seq.

**C.J.S.** — 39A C.J.S., Habeas Corpus, § 397 et seq.

**ALR.** — Right of state or public officer

to appeal from an order in habeas corpus releasing one from custody, 10 ALR 385; 30 ALR 1322.

Supersedeas, stay, or bail, upon appeal in habeas corpus, 143 ALR 1354.

### 9-14-53. Reimbursement to counties for habeas corpus costs.

Each county of this state shall be reimbursed from state funds for court costs both at the trial level and in any appellate court for each writ of habeas corpus sought in the superior court of the county by indigent petitioners when the granting of the writ is denied or when the court costs are cast upon the respondent, but such reimbursement shall not exceed \$10,000.00 per annum total for each county. By not later than September 1 of each calendar year, the clerk of the superior court of each county shall send a certified list to The Council of Superior Court Judges of Georgia of each writ of habeas corpus sought in the superior court of the county during the 12 month period immediately preceding July 1 of that calendar year by indigent petitioners for which the granting of the writ was denied or for which the court costs were cast upon the respondent; and such list shall include the court costs both at the trial level and in any appellate court for each such writ of habeas corpus. By not later than December 15 of each calendar year, the council shall pay to the county from funds appropriated or otherwise made available for the operation of the superior courts the reimbursement as set forth in the certified list, subject to the maximum reimbursement provided for in this Code section. The list sent to the council as provided in this Code section shall be certified as correct by the governing authority of the county and by the judge of the superior court of the county. The council is authorized to devise and make available to the counties such forms as may be reasonably necessary to carry out this Code section and to establish such procedures as may be reasonably necessary for such purposes. This Code section shall not be construed to amend or repeal the provisions of Code Section 15-6-28 or



any other provision of law for funds for any judicial circuit. (Code 1933, § 50-128, enacted by Ga. L. 1978, p. 2051, § 1; Ga. L. 1985, p. 283, § 1; Ga. L. 1993, p. 1402, § 19; Ga. L. 1994, p. 97, § 9; Ga. L. 1999, p. 660, § 1; Ga. L. 2011, p. 477, § 1/SB 193.)

#### JUDICIAL DECISIONS

**Attorney's fees not reimbursable.** — petitioners, does not embrace attorney  
O.C.G.A. § 9-14-53, allowing the state's fees. *Willis v. Price*, 256 Ga. 767, 353  
reimbursement of certain counties for S.E.2d 488 (1987).  
"court costs" for indigent habeas corpus



CHAPTER 15

COURT AND LITIGATION COSTS

Sec.		Sec.	
9-15-1.	Which party liable for costs.	9-15-9.	Costs when recovery on contract is less than \$50.00.
9-15-2.	Affidavit of indigence; procedure when filing party not represented by counsel.	9-15-10.	Costs in personal actions when damages are less than \$10.00.
9-15-3.	When costs may be demanded.	9-15-11.	Inclusion of costs in judgment; itemization and endorsement on execution.
9-15-4.	Deposit prior to filing by clerk; exception if affidavit of indigence filed; repayment of excess; exemptions.	9-15-12.	Liability of plaintiff and attorney for costs when execution returned unsatisfied.
9-15-5.	Deposit by nonresident plaintiff; additional deposit; refund of excess [Repealed].	9-15-13.	Judgment and execution against attorney for costs.
9-15-6.	Liability of attorney of nonresident plaintiff for costs; prior payment of costs in action brought by nonresident attorney and plaintiff.	9-15-14.	Litigation costs and attorney's fees assessed for frivolous actions and defenses.
9-15-7.	Liability of attorney guilty of willful neglect or misconduct for costs.	9-15-15.	Attorney's fees and expenses assessed in civil actions brought against judicial officers.
9-15-8.	Liability for costs of witnesses of adverse party.		

**Cross references.** — Costs, Rules of the Supreme Court of the State of Georgia, Rule 11. Costs, Rules of the Court of Appeals of the State of Georgia, Rule 17.

RESEARCH REFERENCES

**ALR.** — Right to costs as between attorney and client, 22 ALR 1203.  
Attorney's personal liability for expenses incurred in relation to services for client, 66 ALR4th 256.  
Validity of law or rule requiring state court party who requests jury trial in civil case to pay costs associated with jury, 68 ALR4th 343.  
Recovery of attorneys' fees and costs of litigation incurred as result of breach of agreement not to sue, 9 ALR5th 933.

9-15-1. Which party liable for costs.

In all civil cases in any of the courts of this state, except as otherwise provided, the party who dismisses, loses, or is cast in the action shall be liable for the costs thereof. (Orig. Code 1863, § 3601; Code 1868, § 3625; Code 1873, § 3675; Code 1882, § 3675; Civil Code 1895, § 5385; Civil Code 1910, § 5980; Code 1933, § 24-3401.)



## JUDICIAL DECISIONS

**Costs mean legal costs.** *Smith v. Shaffer & Ham*, 65 Ga. 459 (1880).

**Costs include all charges fixed by statute for services rendered by officers of court** during the progress of the cause. *Walton County v. Dean*, 23 Ga. App. 97, 97 S.E. 561 (1918).

**Witness fees are properly included.** *Holmes v. Huguley*, 136 Ga. 758, 72 S.E. 38 (1911).

**All officers charging costs must show authority of law to do so.** *Stamper v. State*, 11 Ga. 643 (1852); *Ward v. Barnes*, 95 Ga. 103, 22 S.E. 133 (1894); *Leonard v. Mayor of Eatonton*, 126 Ga. 63, 54 S.E. 963 (1906); *Walton County v. Dean*, 23 Ga. App. 97, 97 S.E. 561 (1918).

**Sheriff's expenses.** — Necessary and reasonable expenses of a sheriff in seizing property and caring for the property are to be levied. *Eskind v. Harvey*, 20 Ga. App. 412, 93 S.E. 39 (1917).

**Costs do not embrace expenses involved in taking depositions.** *Almand v. Atlantic Coast Line R.R.*, 118 Ga. 468, 45 S.E. 302 (1903).

**Assessment of costs constitutes no part of verdict, but is duty of court.** *Markan Realty Co. v. Klarman*, 99 Ga. App. 703, 109 S.E.2d 907 (1959).

**Decree assessing costs of court against one of parties is final decree,** which the trial court is without authority to enter at an interlocutory hearing on an interlocutory matter, such as the grant or denial of an injunction. *Kight v. Gilliard*, 214 Ga. 445, 105 S.E.2d 333 (1958).

**This section applies only to actions at law;** in equity, the judge may apportion the costs as the judge sees fit. *Lowe v. Byrd*, 148 Ga. 388, 96 S.E. 1001 (1918); *Lavender v. Shackelford*, 152 Ga. 363, 110 S.E. 1 (1921).

**There can be no apportionment of costs** in an action at law. *Story v. Howell*, 85 Ga. App. 661, 70 S.E.2d 29 (1952).

**Usual rule is that in court of law costs are to be paid by losing party,** not out of the estate or fund in controversy. *Irwin v. Peek*, 171 Ga. 375, 155 S.E. 515 (1930).

**Application against losing party.** — Principle of this section that the losing

party shall be taxed for costs has been applied in the following specific instances: landlord in distress warrant, *Reynolds v. Howard*, 113 Ga. 349, 38 S.E. 849 (1901), and action on surety bond when no recovery was had. *Avera Loan & Inv. Co. v. National Sur. Co.*, 32 Ga. App. 319, 123 S.E. 45 (1924).

**Parties liable.** — It follows that a person holding a fi. fa. as collateral cannot be taxed for costs. *Lewis v. Beck & Gregg Hdw. Co.*, 137 Ga. 515, 73 S.E. 739 (1912).

As a general rule, costs are not taxable against a person not a party to the record. *Eskind v. Harvey*, 20 Ga. App. 412, 93 S.E. 39 (1917).

**When verdict was vacated as to both defendants,** costs should not be taxed against a party between whom and the plaintiff there was really no issue. *Stubbs v. Mendel*, 148 Ga. 802, 98 S.E. 476 (1919).

**Next of kin are not generally liable for costs in calling on executor** to prove will in solemn form, if the proceeding is not vexatious. *Irwin v. Peek*, 171 Ga. 375, 155 S.E. 515 (1930).

**Next of kin have right to put executors on proof of will** and this has been held a sufficient reason for not giving costs against them in such an action. *Irwin v. Peek*, 171 Ga. 375, 155 S.E. 515 (1930).

**Usual rule ought to apply as to additional cost for resisting probate.** — In an action by the next of kin calling on an executor to prove a will in solemn form, to the extent of the costs that would necessarily have accrued on the executor's application to probate the will, the estate ought to bear the burden; but as to any cost that resulted from resisting the probate, the usual rule ought to apply and the losing party ought to bear the cost. *Irwin v. Peek*, 171 Ga. 375, 155 S.E. 515 (1930).

**Usual rule applies when will is not admitted.** — Usual rule as to payment by the losing party, and not out of the estate in controversy applies to probate of a will when the will is not admitted. *Williams v. Tolbert*, 66 Ga. 127 (1880); *Francis v. Holbrook*, 68 Ga. 829 (1882); *Baker v. Bancroft*, 79 Ga. 672, 5 S.E. 46 (1887); *Young v. Freeman*, 153 Ga. 827, 113 S.E. 204 (1922).



**Accounting for costs is to be settled when final judgment determines which party is cast.** Ward v. Barnes, 95 Ga. 103, 22 S.E. 133 (1894); Johns v. Lewis Drug Co., 120 Ga. 640, 48 S.E. 127 (1904).

**Verdict is necessary before costs will be taxed on issue of fact.** McWilliams v. Boswell, 145 Ga. 192, 88 S.E. 821 (1916).

**When there is demurrer (now motion to dismiss) to affidavit of illegality** against an execution and levy, and the demurrer (now motion to dismiss) is sustained, nothing is settled as to costs. Sims v. Hatcher, 77 Ga. 389, 3 S.E. 92 (1886).

**Judgment may be diminished but should include all costs.** — Although the defendant may sustain a plea of partial failure of consideration and cause the recovery to be diminished to a sum less than that originally claimed by the plaintiff, the judgment should include costs against the plaintiff, unless the plaintiff has made a valid continuing tender equal in amount to the sum found by the jury, and has duly filed a plea of tender. Livingston Bros. v. Salter, 6 Ga. App. 377, 65 S.E. 60 (1909).

**When motion for new trial is dismissed,** a plaintiff moving for new trial is alone liable for costs. Greer v. Southwestern R.R., 58 Ga. 266 (1877).

**When ownership of property is litigated** and the property is divided equally, the costs should be so divided between the claimant and the defendant. Postell v. Chapman, 80 Ga. 679, 7 S.E. 119 (1888). But see Vaughn v. Howard, 75 Ga. 285 (1885), where the division was not equal.

**Purpose of appeal bond,** on an appeal from the court of ordinary (now probate court), is to protect the appellee, should the appellee prevail, from the payment of the costs should the appellant fail to pay the costs. If litigation ensues after the judgment of the ordinary (now probate judge) approving the return of appraisers, the costs accruing from that litigation are to be taxed as in ordinary cases between adversary parties. In all civil cases, except as provided in the Code, the costs are assessed against the losing party. Marks v. Henry, 85 Ga. App. 275, 68 S.E.2d 923 (1952).

**If appeal from justice court to superior court results in favor of the ap-**

**pellant,** the legal costs paid by the appellant on entering the appeal are a part of the costs for which judgment is to be rendered. Abrams v. Lang, Sons, 60 Ga. 218 (1878).

**When amount awarded by superior court is less than that awarded by ordinary** (now probate judge), on an appeal by the defendant for excessiveness, the costs of the entire proceedings should be taxed against the applicant. Chambliss v. Bolton, 146 Ga. 734, 92 S.E. 204 (1917).

**Consent to correction of error in superior court will not authorize taxing of costs** upon applicant for certiorari. Western & A.R.R. v. Greeson, 68 Ga. 180 (1881).

**Costs will not be decided in Supreme Court except upon review.** Atlanta & W.P.R.R. v. Golightly, 148 Ga. 582, 97 S.E. 516 (1918).

**Cost paid despite eventual success.** — Even though the party cast in the Supreme Court eventually succeeds in the superior court, the party cannot recover such costs. McGuire v. Johnson, 25 Ga. 604 (1858); Walker v. Hillyer, 130 Ga. 466, 61 S.E. 8 (1908).

**Ordinarily, reversal in the Supreme Court carries a judgment for costs in favor of the plaintiff in error.** Pope v. Jones, 79 Ga. 487, 4 S.E. 860 (1887).

**When conditional affirmance of judgment of Supreme Court is complied with,** the plaintiff in error is not entitled to costs incurred in the superior court. Smith v. Turnley, 46 Ga. 454 (1872). See also Summerville Macadamized Rd. Co. v. Baker, 70 Ga. 513 (1883).

**Motion to retax costs.** — If a defendant has complied with the demands of a plaintiff after an action has been instituted against the defendant, the costs of court should be assessed against the defendant; however, such question cannot be raised by a motion for new trial but should be raised by a timely motion to retax the costs since the judgment of costs is not part of the verdict but a duty of the court. Markan Realty Co. v. Klarman, 99 Ga. App. 703, 109 S.E.2d 907 (1959).

When a defendant pays a plaintiff the amount claimed to be due in a petition after the action is filed against the defendant, or performs in accordance with the



prayers of a petition for a writ of mandamus, the court costs, as a matter of law, in the absence of an agreement between the parties, should be assessed against the defendant; but when no effort has been made by the plaintiff, in a case where the trial court orders such costs to be paid by the plaintiff, to have the costs retaxed, no question for decision is presented to the appellate courts and a motion for new trial would not raise such question. *Markan Realty Co. v. Klarman*, 99 Ga. App. 703, 109 S.E.2d 907 (1959).

**Equity cases.** — Judge in equity, as under the old English practice, may do in an equity case what could not be done by the presiding judge in a case at law, thus relaxing the rule found in this section; upon this principle of equity power, the right to fix counsel fees, no less than statutory costs, in an equity case resides in the judge and not in the jury. *Georgia Veneer & Package Co. v. Florida Nat'l Bank*, 198 Ga. 591, 32 S.E.2d 465 (1944).

**Judge to determine upon whom costs fall in equity.** — While in all civil actions at law, except as otherwise provided, the party who shall discontinue, fail, or be cast in such suit shall be liable for the costs thereof, under the statutes in equity cases it is the province of the judge to determine upon whom the costs shall fall, and the Supreme Court will not interfere unless the judge's discretion has been abused. *Walden v. S.M. Whitney Co.*, 201 Ga. 65, 38 S.E.2d 744 (1946).

**Indigent not relieved of liability.** — O.C.G.A. § 9-15-2 does not relieve an in-

digent inmate from paying costs required under O.C.G.A. § 9-15-1. *Newsome v. Graham*, 254 Ga. 711, 334 S.E.2d 183 (1985).

**Local court rule provision for taxing the costs of arbitration** against a party who demands a trial de novo and does not improve that party's position did not constitute a conflict with O.C.G.A. § 9-15-1 since such a party is a loser within the scheme of the arbitration project. *Davis v. Gaona*, 260 Ga. 450, 396 S.E.2d 218 (1990).

**Cited in** *Bremen Foundry & Mach. Works v. McLendon*, 19 Ga. App. 650, 91 S.E. 1049 (1917); *Grizzard v. Ford*, 167 Ga. 531, 146 S.E. 126 (1928); *Hartsfield Co. v. Shoaf*, 184 Ga. 378, 191 S.E. 693 (1937); *Hicks v. Atlanta Trust Co.*, 187 Ga. 314, 200 S.E. 301 (1938); *Board of Educ. v. Fowler*, 192 Ga. 35, 14 S.E.2d 478 (1941); *Hyndman v. Hyndman*, 208 Ga. 797, 69 S.E.2d 859 (1952); *Mendenhall v. Kingloff*, 215 Ga. 726, 113 S.E.2d 449 (1960); *Fulton County v. Woodside*, 223 Ga. 316, 155 S.E.2d 404 (1967); *King v. Cox*, 130 Ga. App. 91, 202 S.E.2d 216 (1973); *Herring v. Ferrell*, 137 Ga. App. 156, 223 S.E.2d 213 (1976); *Paul v. Paul*, 236 Ga. 692, 225 S.E.2d 45 (1976); *Brown v. Donahoo*, 141 Ga. App. 309, 233 S.E.2d 269 (1977); *City of Atlanta v. International Ass'n of Firefighters Local 134*, 240 Ga. 24, 239 S.E.2d 353 (1977); *King v. Loyd*, 170 Ga. App. 638, 317 S.E.2d 879 (1984); *Caldwell v. State*, 253 Ga. 400, 321 S.E.2d 704 (1984); *Weprin v. Peterson*, 736 F. Supp. 1131 (N.D. Ga. 1988).

## OPINIONS OF THE ATTORNEY GENERAL

**Payment by Board of Offender Rehabilitation of costs in habeas corpus cases brought against wardens** of the various institutions should only be done upon compliance by the clerk of the taxing

court with the statutory provisions; such compliance is not established by the rendering of a statement of account. 1969 Op. Att'y Gen. No. 69-218.

## RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 7C Am. Jur. Pleading and Practice Forms, Costs, § 1 et seq.

**ALR.** — Right to costs where judgment

is against plaintiff on his complaint and against defendant on his counterclaim, 75 ALR 1400.

Award of costs to defendant on causes of



action where claims of some, but not all, of coplaintiffs were successful, 68 ALR2d 1058.

Liability of state, or its agency or board, for costs in civil action to which it is a party, 72 ALR2d 1379.

Liability insurer's liability for interest and costs on excess of judgment over policy limit, 76 ALR2d 983.

Taxable costs and disbursements as including expenses for bonds incident to steps taken in action, 90 ALR2d 448.

Allowance of attorney's fees in civil contempt proceedings, 43 ALR3d 793.

Dismissal of plaintiff's action as entitling defendant to recover attorneys' fees or costs as "prevailing party" or "successful party," 66 ALR3d 1087.

Who is the "successful party" or "prevailing party" for purposes of awarding costs where both parties prevail on affirmative claims, 66 ALR3d 1115.

Continuance of civil case as conditioned upon applicant's payment of costs or expenses incurred by other party, 9 ALR4th 1144.

## **9-15-2. Affidavit of indigence; procedure when filing party not represented by counsel.**

(a)(1) When any party, plaintiff or defendant, in any action or proceeding held in any court in this state is unable to pay any deposit, fee, or other cost which is normally required in the court, if the party shall subscribe an affidavit to the effect that because of his indigence he is unable to pay the costs, the party shall be relieved from paying the costs and his rights shall be the same as if he had paid the costs.

(2) Any other party at interest or his agent or attorney may contest the truth of an affidavit of indigence by verifying affirmatively under oath that the same is untrue. The issue thereby formed shall be heard and determined by the court, under the rules of the court. The judgment of the court on all issues of fact concerning the ability of a party to pay costs or give bond shall be final.

(b) In the absence of a traverse affidavit contesting the truth of an affidavit of indigence, the court may inquire into the truth of the affidavit of indigence. After a hearing, the court may order the costs to be paid if it finds that the deposit, fee, or other costs can be paid and, if the costs are not paid within the time permitted in such order, may deny the relief sought.

(c) The adjudication of the issue of indigence shall not affect a decision on the merits of the pending action.

(d) When a civil action is presented for filing under this Code section by a party who is not represented by an attorney, the clerk of court shall not file the matter but shall present the complaint or other initial pleading to a judge of the court. The judge shall review the pleading and, if the judge determines that the pleading shows on its face such a complete absence of any justiciable issue of law or fact that it cannot be reasonably believed that the court could grant any relief against any party named in the pleading, then the judge shall enter an order



denying filing of the pleading. If the judge does not so find, then the judge shall enter an order allowing filing and shall return the pleading to the clerk for filing as in other cases. An order denying filing shall be appealable in the same manner as an order dismissing an action. (Ga. L. 1955, p. 584, §§ 1, 2; Ga. L. 1982, p. 933, § 1; Ga. L. 1983, p. 3, § 7; Ga. L. 1984, p. 22, § 9; Ga. L. 1985, p. 1256, § 1.)

**Cross references.** — Filing of affidavit of indigence for renewal of action after dismissal or discontinuance, § 9-2-63.

**Editor's notes.** — Ga. L. 1985, p. 1256,

§ 2, not codified by the General Assembly, provided that that Act would apply to actions filed or presented for filing on or after July 1, 1985.

## ANALYSIS

### GENERAL CONSIDERATION APPLICATION

#### General Consideration

### JUDICIAL DECISIONS

**Constitutionality.** — Since there is no constitutional per se right to appeal, the defendant suffers no denial of due process because of the provision of O.C.G.A. § 9-15-2 that the trial court's findings concerning a party's ability to pay costs or post bond are not subject to review. *Penland v. State*, 256 Ga. 641, 352 S.E.2d 385 (1987).

When the defendant did not claim that the defendant was being treated differently from other individuals similarly situated in regard to the provisions of O.C.G.A. § 9-15-2, i.e., that findings of the court concerning the ability of a party to pay costs shall be final, there was no merit to the defendant's claim that the defendant was suffering discrimination because the defendant was indigent. *Penland v. State*, 256 Ga. 641, 352 S.E.2d 385 (1987).

**O.C.G.A. § 9-15-2 does not relieve an indigent inmate from paying costs** required under O.C.G.A. §§ 9-15-1 and 9-15-11. *Newsome v. Graham*, 254 Ga. 711, 334 S.E.2d 183 (1985).

**Documents could not be construed as proper affidavit.** — Plaintiff filing pro se had not filed anything that could be construed as an affidavit of indigency under Ga. Unif. Super. Ct. R. 36.10 and O.C.G.A. § 9-15-2; the plaintiff had provided a document entitled "motion to proceed in forma pauperis" but had not had

the document notarized, and a referenced "application to proceed in forma pauperis" was not included in the record. *Anderson v. Hardoman*, 286 Ga. App. 499, 649 S.E.2d 611 (2007).

**No further affidavit of indigence when affidavit filed in prior action.** — Provision in subsection (a) of O.C.G.A. § 9-15-2 that an affidavit of indigence relieves a party of "any deposit, fee, or other cost" requires that when a plaintiff files such an affidavit upon bringing an action, takes a voluntary dismissal, then seeks to renew the action, no payment of accrued costs and no further affidavit of indigence are required for the filing of the renewal action. *McKenzie v. Seaboard Sys. R.R.*, 173 Ga. App. 402, 326 S.E.2d 502 (1985).

**Hearing on contested affidavit not mandated.** — Although paragraph (a)(2) of O.C.G.A. § 9-15-2 provides that the matter of indigence "shall be heard and determined by the court, under the rules of the court," after a party at interest or the party's agent has contested the truth of the affidavit of indigence, the statute does not mandate an oral hearing. *Morris v. DOT*, 209 Ga. App. 40, 432 S.E.2d 638 (1993).

**Separate hearing on court's inquiry into validity of affidavit.** — In a dispossessory action, an inquiry by the



court in the absence of a traverse affidavit into the truthfulness of a pauper's affidavit filed by the defendant should have taken place during a separate hearing and the defendant was entitled to adequate notice of such hearing. *Walker v. Crane*, 216 Ga. App. 765, 455 S.E.2d 855 (1995).

**No hearing required if affidavit invalid.** — Affidavit of indigency which did not contain a jurat was invalid and the trial court therefore was authorized to rule on the affiant's motion without a hearing. *D'Zesati v. Poole*, 174 Ga. App. 142, 329 S.E.2d 280 (1985).

**Trial court's ruling on indigency nonreviewable.** — Ruling of the trial court on factual issue of appellant's indigency is final and not subject to appellate review. *Harris v. State*, 170 Ga. App. 726, 318 S.E.2d 315 (1984).

Trial court's findings that the plaintiff was able to pay the costs of preparing a record is not reviewable even though no opposing affidavit challenging the plaintiff's affidavit of indigency was filed. *Saylors v. Emory Univ.*, 187 Ga. App. 460, 370 S.E.2d 625, cert. denied, 187 Ga. App. 908, 370 S.E.2d 625 (1988).

Ordinarily, under O.C.G.A. § 5-6-47(b) and subsection (a)(2) of O.C.G.A. § 9-15-2, a trial court's findings concerning a party's indigency are not reviewable in cases when the affidavit of indigency has been traversed by an opposing affidavit. *Quaterman v. Weiss*, 212 Ga. App. 563, 442 S.E.2d 813 (1994).

In a breach of contract suit brought by an oncologist against a corporation, the corporation's failure to submit an opposing affidavit to the oncologist's pauper's affidavit did not alter the fact that the trial court's findings regarding the oncologist's indigency were not subject to appellate review. Under O.C.G.A. §§ 5-6-47(b) and 9-15-2(a)(2), a trial court's ruling regarding indigency was final and not subject to appellate review; the proper forum for determining the truth of a pauper's affidavit was in the trial court. *Mitchell v. Cancer Carepoint, Inc.*, 299 Ga. App. 881, 683 S.E.2d 923 (2009).

**Findings of fact not required.** — There is no statutory authority which requires that findings of fact be made in an order denying a motion to proceed in

forma pauperis. *Harris v. State*, 170 Ga. App. 726, 318 S.E.2d 315 (1984).

**Court may not prohibit filing of habeas complaint.** — Subsection (d) of O.C.G.A. § 9-15-2, which permits a trial court to deny the filing of a pro se in forma pauperis complaint after determining that on the complaint's face the pleading completely lacks justiciable law or fact, was not meant to apply to habeas corpus proceedings; therefore, a court may address a petition for habeas corpus only after the petition has been filed. *Giles v. Ford*, 258 Ga. 245, 368 S.E.2d 318 (1988).

**In absence of traverse to affidavit, error to deny in forma pauperis motion.** — In the absence of a traverse to the affidavit, it is error to deny the appellant's motion to proceed in forma pauperis. When this error occurs, the appellant must be reimbursed for all costs actually paid by the appellant because of the requirements of O.C.G.A. § 5-6-46. However, the appellant is not entitled to be reimbursed for attorney's fees incurred during the appeal. *Heath v. McGuire*, 167 Ga. App. 489, 306 S.E.2d 741 (1983).

**Free transcript required.** — Prior to the 1982 amendment of O.C.G.A. § 9-15-2, the trial court was required to grant a motion for an in forma pauperis copy of the transcript in the absence of a traverse. *Quick v. State*, 166 Ga. App. 492, 304 S.E.2d 916 (1983).

**Refusal to file pleading absent justiciable issues.** — When the pleading sought to be filed by the pro se plaintiff demonstrated a complete absence of any justiciable issue of law or fact, the trial court did not err in entering an order denying filing of the pleading against any of the parties. *Hawkins v. Rice*, 203 Ga. App. 537, 417 S.E.2d 174 (1992).

Filing of a pro se plaintiff's complaint was properly denied since the claims alleging wrongdoing by officials did not present justiciable issues; no facts were alleged showing illegal conduct and bald assertions of impropriety were insufficient absent specific allegations as to how the defendant's conduct violated the law. *Williams v. Skandalakis*, 265 Ga. 693, 461 S.E.2d 226 (1995).

**Sovereign immunity results in no justiciable issue.** — Trial court properly



refused to allow the plaintiff's pro se complaint based on state law and damage claims pursuant to 42 U.S.C. § 1983 when such claims are barred by a sovereign immunity defense, thus presenting no justiciable issue. *Mosier v. State Bd. of Pardons & Paroles*, 213 Ga. App. 545, 445 S.E.2d 535 (1994), cert. denied, 5 U.S. 1040, 115 S. Ct. 1409, 131 L. Ed. 2d 295 (1995).

**Subsequent order denying filing of a claim was a nullity**, when the procedure prescribed in subsection (d) of O.C.G.A. § 9-15-2 was followed, and the judge to whom the claim was presented found that the complaint set forth a justiciable issue and had issued an earlier order directing the clerk to file the pleadings. *Barber v. Collins*, 194 Ga. App. 385, 390 S.E.2d 633 (1990).

**Ruling on ability to pay costs and give bond not reviewable.** — Ruling of the trial court on all issues of fact concerning the ability of a party to pay costs or give bond is final under the provisions of subsection (b) of O.C.G.A. § 9-15-2 and is not subject to review. *Morris v. DOT*, 209 Ga. App. 40, 432 S.E.2d 638 (1993).

When an inmate's pro se petition for mandamus to compel the inmate's transfer to another prison alleged that because the inmate had served in law enforcement, the inmate faced substantial risk of harm in the facility in which the inmate was housed, and that prison officials were aware of this condition, the denial of the filing of this petition was error because of the fact questions raised therein. *Yizar v. Ault*, 265 Ga. 708, 462 S.E.2d 141 (1995).

Trial court erred in refusing to allow a prison inmate to proceed on a state law conversion claim against the Georgia Department of Corrections under the Georgia Tort Claims Act (GTCA), O.C.G.A. § 50-21-20 et seq., because the inmate stated a claim for conversion against the Department under the GTCA; the inmate alleged that prison officials wrongfully confiscated the inmate's personal property contrary to the Department's Standard Operating Procedures. *Romano v. Ga. Dep't of Corr.*, 303 Ga. App. 347, 693 S.E.2d 521 (2010).

Trial court did not err in disallowing a prison inmate to file a conversion claim

against a warden and corrections officers under the Georgia Tort Claims Act (GTCA), O.C.G.A. § 50-21-20 et seq., because their actions were clothed with official immunity under the GTCA, O.C.G.A. § 50-21-25(b), since they were acting within the scope of their official duties when they confiscated the inmate's personal property; the inmate acknowledged that the Georgia Department of Corrections had to be named as a defendant, which necessarily amounted to a concession that Department employees were not proper defendants, and their alleged tortious conduct occurred while they were acting within the scope of their official duties. *Romano v. Ga. Dep't of Corr.*, 303 Ga. App. 347, 693 S.E.2d 521 (2010).

Trial court did not err in denying a prison inmate's request to proceed in forma pauperis on a claim that the Georgia Department of Corrections, the warden of a state prison, and two corrections officers were liable under 42 U.S.C. § 1983 for the wrongful confiscation of the inmate's personal property because the inmate's attempt to state a § 1983 claim against the warden and officers in their individual capacities failed since the inmate did not adequately allege a violation of rights under the Fourteenth Amendment; neither a state agency nor state officers acting in their official capacities are "persons" susceptible to liability under § 1983. *Romano v. Ga. Dep't of Corr.*, 303 Ga. App. 347, 693 S.E.2d 521 (2010).

**Review of denial of pro se pleading.** — In reviewing a decision denying the filing of a pro se pleading pursuant to subsection (d) of O.C.G.A. § 9-15-2, the pleading is construed in the light most favorable to the losing party. *Grant v. Byrd*, 265 Ga. 684, 461 S.E.2d 871 (1995).

**Error to dismiss appeal.** — Trial court's dismissal of an appeal from a summary judgment dismissing a wrongful death claim brought by four children, due to the failure of two of the children to pay costs or submit affidavits of indigency, was in error as to two of the children who filed affidavits of indigency; assuming the children filed true affidavits of indigence (O.C.G.A. § 9-15-2(a)(2), (b)), the children had rights to appeal from the dismissal of the children's proportionate shares of the



wrongful death case because: (1) the wrongful death claim was not jointly in all the children or in none of the children; and (2) originally, each child had a separate claim for one-fourth of the value of the decedent's life. *Mapp v. We Care Transp. Servs.*, 314 Ga. App. 391, 724 S.E.2d 790 (2012), cert. denied, No. S12C1111, 2012 Ga. LEXIS 660 (Ga. 2012).

### Application

**No private right of action regarding deceased's remains.** — Individual was not permitted pursuant to O.C.G.A. § 9-15-2(d) to file a pro se civil complaint related to the final disposition of a family member's remains because no applicable legal authority recognized any private right of action based on alleged violations of O.C.G.A. § 31-21-44, a criminal statute relating to the disposition of human remains. *Verdi v. Wilkinson County*, 288 Ga. App. 856, 655 S.E.2d 642 (2007), cert. denied, 2008 Ga. LEXIS 397 (Ga. 2008).

**Petition sufficient to state negligence action.** — When an indigent prisoner filed suit alleging that after the prisoner's fall on a wet floor, the prisoner was left unattended in the prison infirmary for over 14 hours until the prisoner was transported to another medical center for surgery to repair a broken leg, asserted that prison officials were negligent, requested damages for the prisoner's residual pain and disabilities, requested a jury trial, and filed the requisite pauper's affidavit and proceeded in forma pauperis, the petition was more than sufficient to set forth a cause of action under O.C.G.A. § 9-11-8 as it is only necessary that the defendants be placed on notice of the claim against the defendants. *Gonzalez v. Zant*, 199 Ga. App. 13, 403 S.E.2d 880 (1991).

**Refund of filing fee.** — Trial court did not err by denying a client's motion under O.C.G.A. § 9-15-2(a)(1) for a refund of the filing fee paid in the client's initial legal malpractice action after granting the client's right to proceed in forma pauperis because the client failed to provide any authority to support the contention that a trial court was required to direct the clerk to refund a filing fee paid before the filing of a pauper's affidavit. *Quarterman v.*

*Cullum*, 311 Ga. App. 800, 717 S.E.2d 267 (2011), cert. denied, No. S12C0297, 2012 Ga. LEXIS 179 (Ga. 2012); cert. dismissed, U.S. , 133 S. Ct. 388, 184 L. Ed. 2d 10 (2012).

**Consideration of inmate's pro se pleadings.** — Pleadings of an inmate proceeding pro se are treated with considerable indulgence, and a complaint should not be dismissed without filing unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the plaintiff's claim which would entitle the plaintiff to some relief. *Jackson v. Zant*, 210 Ga. App. 581, 436 S.E.2d 771 (1993).

When an inmate sought permission to commence a pro se civil action against the warden alleging inhumane and oppressive treatment, in that the inmate was forced to sleep on the floor for several months, and making a claim for money damages, the superior court erred in denying the filing of the complaint in toto; even though there was no issue of law or fact as to the claim for money damages, it was conceivable that a judge would order the provision of suitable bedding for the inmate. *Jackson v. Zant*, 210 Ga. App. 581, 436 S.E.2d 771 (1993).

**Duty to obtain transcript for appeal in wrongful foreclosure.** — Homeowner's appeal in a wrongful foreclosure case was properly dismissed due to the homeowner's failure to file the transcript of the summary judgment proceedings for more than eight months after the deadline provided in O.C.G.A. § 5-6-42; the homeowner's proceeding in forma pauperis, O.C.G.A. § 9-15-2, did not excuse the homeowner's failure to timely obtain the transcript. *Ashley v. JP Morgan Chase Bank, N.A.*, 327 Ga. App. 232, 758 S.E.2d 135 (2014).

**Denial of civil complaint when habeas appropriate.** — Refusal of prisoner's complaint against district attorneys and assistant district attorneys for violation of the prisoner's constitutional rights and false imprisonment was proper since a petition for a writ of habeas corpus was the appropriate procedure for challenging the conduct of the defendants. *Battle v. Sparks*, 211 Ga. App. 106, 438 S.E.2d 185 (1993).

**Denial of indigence was error.** — Denial of the plaintiff's affidavit of indi-



gence was error since it was not contested and there was no evidence showing that the plaintiff was not indigent. *Barham v. Levy*, 228 Ga. App. 594, 492 S.E.2d 325 (1997).

Trial court erred by refusing an inmate's request to proceed in forma pauperis under O.C.G.A. § 9-15-2(d) and to file the inmate's complaint because the court could not decipher the inmate's complaint since construing the complaint in the light most favorable to the inmate, the inmate did state justiciable claims for false arrest, false imprisonment, and violation of the inmate's civil rights. *Thompson v. Reichert*, 318 Ga. App. 23, 733 S.E.2d 342 (2012).

**Denial of indigency appropriate.** — Mortgagor's purported affidavit of indigency was found to be invalid and was not subject to review pursuant to O.C.G.A. § 9-15-2(b), after the mortgagor had been previously ordered to pay attorney's fees and costs arising from a foreclosure action wherein the mortgagor refused to surrender the property, because the trial court found that the mortgagor was not indigent based on the mortgagor's own statements

to the court and the court's knowledge of the mortgagor and the mortgagor's prior actions within the proceeding as well as the traverse of the mortgagor's affidavit of indigency by the mortgagee. *Hurt v. Norwest Mortg., Inc.*, 260 Ga. App. 651, 580 S.E.2d 580 (2003).

**Cited in** *Portis v. Evans*, 249 Ga. 396, 291 S.E.2d 511 (1982); *Whitehead v. Lavoie*, 176 Ga. App. 666, 337 S.E.2d 357 (1985); *Evans v. City of Atlanta*, 189 Ga. App. 566, 377 S.E.2d 31 (1988); *Conklin v. Zant*, 198 Ga. App. 543, 402 S.E.2d 319 (1991); *Barber v. Collins*, 201 Ga. App. 104, 410 S.E.2d 444 (1991); *McBride v. Gaither*, 203 Ga. App. 885, 418 S.E.2d 67 (1992); *Vanalstine v. Roach*, 265 Ga. 820, 461 S.E.2d 539 (1995); *Shelby v. McDaniel*, 266 Ga. 215, 465 S.E.2d 433 (1996); *Gamble v. Diamond "D" Auto Sales*, 221 Ga. App. 688, 472 S.E.2d 446 (1996); *Jones v. Townsend*, 267 Ga. 489, 480 S.E.2d 24 (1997); *Cooper v. State*, 235 Ga. App. 66, 508 S.E.2d 447 (1998); *In re Carter*, 235 Ga. App. 551, 510 S.E.2d 91 (1998); *Moore v. First Family Fin. Servs.*, 246 Ga. App. 89, 539 S.E.2d 598 (2000).

## RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 7C Am. Jur. Pleading and Practice Forms, Costs, § 45.

**ALR.** — Attorney's liability under state law for opposing party's counsel fees, 56 ALR4th 486.

What constitutes "fees" or "costs" within

meaning of Federal Statutory Provision (28 USCS § 1915 and similar predecessor statutes) permitting party to proceed in forma pauperis without prepayment of fees and costs or security therefor, 142 ALR Fed 627.

## 9-15-3. When costs may be demanded.

The several officers of court are prohibited from demanding the costs in any civil case or any part thereof until after judgment in the same, except as otherwise provided by law. (Laws 1834, Cobb's 1851 Digest, p. 506; Laws 1842, Cobb's 1851 Digest, p. 507; Code 1863, § 3609; Code 1868, § 3634; Code 1873, § 3684; Code 1882, § 3684; Civil Code 1895, § 5393; Civil Code 1910, § 5991; Code 1933, § 24-3409.)

## JUDICIAL DECISIONS

**No fee in advance for entering motion.** — Clerk is not entitled to claim a fee in advance for entering a case upon the

motion docket. *Ball v. Duncan*, 30 Ga. 938 (1860); *Dickson v. Hutchinson*, 173 Ga. 644, 161 S.E. 139 (1931).



**Decree assessing costs of court against one of parties is final decree,** which the trial court is without authority to enter at an interlocutory hearing on an interlocutory matter, such as the grant or denial of an injunction. *Kight v. Gilliard*, 214 Ga. 445, 105 S.E.2d 333 (1958).

**Payment on judgment.** — Under former Code 1882, §§ 3684 and 3685 (see now O.C.G.A. §§ 9-15-3 and 9-15-11), the costs of a case were payable to the officers on the rendition of the judgment. *Erwin v. United States*, 37 F. 470 (S.D. Ga. 1889), rev'd on other grounds, 47 U.S. 676, 13 S. Ct. 439, 37 L. Ed. 328 (1893).

**Funds in receiver's hand.** — Clerk has no right to the clerk's costs out of the fund in a receiver's hands, until the fund has been adjudged subject to costs, on the termination of the case. *Eugene S. Ballin & Co. v. M. Ferst & Co.*, 55 Ga. 546 (1875); *Dickson v. Hutchinson*, 173 Ga. 644, 161 S.E. 139 (1931).

**Judgments cannot be set off in amounts including unpaid court costs.** — When one party, as transferee of a judgment against another, seeks to have a judgment obtained by such other party against the transferee set off and credited

on the transferee's large judgment, and the costs due court officers in the judgment sought to be applied against the judgment have not been paid, the judgments cannot be set off in amounts which include the unpaid court costs. *Hollomon v. Humber*, 180 Ga. 470, 179 S.E. 365 (1935).

**Statutory lien as absolute right.** — While court officers cannot demand their fees in advance, except in a few specified cases, but must await the outcome of the trial, the officers are compensated with a statutory lien which comes into existence as an absolute right, not a mere dormant or conditional right, even before it is determined in a given case whether the plaintiff or the defendant shall recover. Though it is not determined until after the verdict who is to pay the fees, the officers become entitled to the fees before the rendition of the verdict. *Hollomon v. Humber*, 180 Ga. 470, 179 S.E. 365 (1935).

**Cited in** *Rutherford v. Jones*, 12 Ga. 618 (1853); *Land v. Jolley*, 175 Ga. 788, 166 S.E. 271 (1932); *Mendenhall v. Kingloff*, 215 Ga. 726, 113 S.E.2d 449 (1960); *MacMurphey v. Dobbins*, 53 Ga. 294 (1974).

## OPINIONS OF THE ATTORNEY GENERAL

**Clerk may not be required to file divorce case until deposit** of amount due under former Code 1933, § 24-2727 (see now O.C.G.A. § 15-6-77) was made. 1969 Op. Att'y Gen. No. 69-99.

**Clerk of superior court may not demand more than amount due as advance costs deposit** under former

Code 1933, § 24-2727 (see now O.C.G.A. § 15-6-77) for the filing of a divorce proceeding, although the clerk may accept such additional costs as the party volunteers to pay towards the total anticipated court costs of the proceeding. 1969 Op. Att'y Gen. No. 69-111.

## RESEARCH REFERENCES

**ALR.** — Taxable costs and disbursements as including expenses for bonds incident to steps taken in action, 90 ALR2d 448.

Continuance of civil case as conditioned upon applicant's payment of costs or expenses incurred by other party, 9 ALR4th 1144.

### 9-15-4. Deposit prior to filing by clerk; exception if affidavit of indigence filed; repayment of excess; exemptions.

(a) A clerk of the superior court shall not be required to file any civil case or proceeding until the fee required by Code Section 15-6-77 and Code Section 15-6-77.2, relating to fees of clerks of the superior courts,



has been paid to the clerk. The fee shall not be required if the party desiring to file the case or proceeding is unable because of his indigence to pay the fee and the party files with the clerk an affidavit to such effect.

(b) The deposit required to be filed by this Code section shall not affect any other law which requires a deposit in excess of or in addition to the deposit of cost required by this Code section.

(c) Nothing contained in this Code section shall be deemed to require a deposit of cost by the state, its agencies, or its political subdivisions; and, without limiting the generality of the foregoing, no clerk of any court shall be authorized to require any deposit of costs in any action or proceeding for the collection of criminal penalties as authorized under Code Section 42-8-34.2. (Ga. L. 1890-91, p. 100, § 1; Civil Code 1895, § 5398; Civil Code 1910, § 5986; Code 1933, § 24-3406; Ga. L. 1945, p. 207, § 1; Ga. L. 1957, p. 405, § 2; Ga. L. 1958, p. 398, § 1; Ga. L. 1970, p. 497, § 4; Ga. L. 1971, p. 214, § 2; Ga. L. 1972, p. 664, § 5; Ga. L. 1981, p. 1396, § 2; Ga. L. 1986, p. 1002, § 4; Ga. L. 1991, p. 1051, § 2.)

**Law reviews.** — For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010).

## JUDICIAL DECISIONS

**Clerk's filing without deposit or affidavit not waiver of costs.** — Clerk's filing of a complaint without having received a deposit or an affidavit of indigence did not constitute a waiver of assessment of court costs against the complainant. *Whitehead v. Lavoie*, 176 Ga. 666, 337 S.E.2d 357 (1985).

**Contempt motion filed more than 30 days after judgment.** — Plaintiff's motion for contempt for failure to comply with court-ordered postjudgment discovery that was submitted more than 30 days after judgment was considered a new proceeding within the meaning of O.C.G.A. § 15-6-77(e)(1) for purposes of calculating

the costs the superior court clerk was entitled to charge and collect. *McFarland & Assocs., P.C. v. Hewatt*, 242 Ga. App. 454, 529 S.E.2d 902 (2000).

**Cited** in *Harper v. Burgess*, 225 Ga. 420, 169 S.E.2d 297 (1969); *Hospital Auth. v. Stewart*, 226 Ga. 530, 175 S.E.2d 857 (1970); *Portis v. Evans*, 249 Ga. 396, 291 S.E.2d 511 (1982); *Rivergate Corp. v. Atlanta Indoor Adv. Concepts, Inc.*, 210 Ga. App. 501, 436 S.E.2d 697 (1993); *Anderson v. Hardoman*, 286 Ga. App. 499, 649 S.E.2d 611 (2007); *Newton Timber Co., L.L.P. v. Monroe County Bd. of Tax Assessors*, 755 S.E.2d 770 (2014).

## OPINIONS OF THE ATTORNEY GENERAL

**Clerk may not be required to file any divorce case until deposit** of amount due under former Code 1933, § 24-2727 (see now O.C.G.A. § 15-6-77) was made. 1969 Op. Att'y Gen. No. 69-99.

**demand more than amount due** as advance costs deposit under former Code 1933, § 24-2727 (see now O.C.G.A. § 15-6-77) for the filing of a divorce proceeding, although the clerk may accept such additional costs as the party volun-



teers to pay towards the total anticipated court costs of the proceeding. 1969 Op. Att'y Gen. No. 69-111.

**Appeals to superior court.** — Party who files notice of appeal under former Code 1933, § 92-6912 (see now O.C.G.A. § 48-5-311(f)) was party bearing burden of cost deposit under former Code 1933, §§ 24-2727 and 24-3406 (see now O.C.G.A. §§ 9-15-4 and 15-6-77). 1974 Op. Att'y Gen. No. U74-46.

Appellants contesting a decision rendered by a county board of equalization in superior court must pay the advance court cost deposit set forth in O.C.G.A. §§ 9-15-4 and 15-6-77. 1985 Op. Att'y Gen. No. U85-17.

Taxpayers appealing from decisions of the state revenue commissioner pursuant to O.C.G.A. § 48-2-59 need only comply with the specific requirements of that section with regard to court costs; taxpayers need not pay the advance court cost deposit set forth in O.C.G.A. §§ 9-14-4 and 15-6-77. 1985 Op. Att'y Gen. No. U85-17.

Appellants contesting the award of a special master need not pay the advance court cost deposit set forth in O.C.G.A.

§§ 9-15-4 and 15-6-77 if the appellants have properly paid the required costs for filing the initial condemnation petition. 1985 Op. Att'y Gen. No. U85-17.

**Clerk of superior court must refund portion of advance costs deposit exceeding actual costs.** 1976 Op. Att'y Gen. No. U76-61.

**Advance deposit not increased by increase in sheriffs' fees.** — Increase in sheriffs' fees under former Code 1933, § 24-2823 (see now O.C.G.A. § 15-16-21) did not serve to increase the amount designated in former Code 1933, § 24-3406 (see now O.C.G.A. § 9-15-4) as advance deposit, but must be collected at the termination of the case as were other costs. 1968 Op. Att'y Gen. No. 68-325.

**Sheriff's fees in addition to deposit.** — Sheriff's fee set forth in the 1976 amendment to former Code 1933, § 24-2823 (see now O.C.G.A. § 15-16-21) should be paid at the clerk's office at the time of filing, if required in a particular case; and that payment of the sheriff's fees was required in addition to the deposit for the clerk's fees which were payable at the time of filing appropriate cases. 1976 Op. Att'y Gen. No. U76-37.

## RESEARCH REFERENCES

**ALR.** — Exception as regards payments to officers of court to rule preventing recovery back of payments made under mistake of law, 111 ALR 637.

Taxable costs and disbursements as including expenses for bonds incident to steps taken in action, 90 ALR2d 448.

### 9-15-5. Deposit by nonresident plaintiff; additional deposit; refund of excess.

Reserved. Repealed by Ga. L. 1981, p. 1396, § 23, effective July 1, 1981.

**Editor's notes.** — Ga. L. 2006, p. 72, § 9, part of an Act to revise, modernize, and correct the Code, reserved this Code section.

### 9-15-6. Liability of attorney of nonresident plaintiff for costs; prior payment of costs in action brought by nonresident attorney and plaintiff.

(a) When any attorney institutes an action in any of the courts of this state for any person who resides outside this state, the attorney shall be liable to pay all costs of the officers of court in the event that the action is dismissed or the plaintiff is cast in the action.



(b) When the plaintiff and his attorney both reside outside the limits of this state, the proper officers may demand their full costs before they shall be bound to perform any service in any case commenced by the nonresident attorney or plaintiff. (Laws 1812, Cobb's 1851 Digest, p. 505; Laws 1839, Cobb's 1851 Digest, p. 507; Code 1863, §§ 3603, 3605; Code 1868, §§ 3627, 3629; Code 1873, §§ 3677, 3679; Code 1882, §§ 3677, 3679; Civil Code 1895, §§ 5387, 5389; Civil Code 1910, § 5982; Code 1933, § 24-3403.)

### JUDICIAL DECISIONS

**Section only applies when plaintiffs are all nonresidents.** — This section only applies when the plaintiff or plaintiffs are all nonresidents; therefore, when an attorney institutes a suit in behalf of the plaintiffs some of whom are resident and some not, the attorney is not liable for any of the costs. *Berrie v. Atkinson*, 114 Ga. 708, 40 S.E. 708 (1902).

**Liability of nonresident plaintiff's attorney though balance recovered by set off.** — Nonresident plaintiff's attorney is liable for costs though the defendant had recovered a balance under the plea of set off. *Mackey v. Blake*, 15 Ga. 402 (1854).

**Cited** in *Benson v. Aiken*, 117 Ga. App. 245, 160 S.E.2d 453 (1968).

### RESEARCH REFERENCES

**ALR.** — Nonresident's duty to furnish security for costs as affected by joinder or addition of resident, 158 ALR 737.

## 9-15-7. Liability of attorney guilty of willful neglect or misconduct for costs.

If any plaintiff is involuntarily dismissed or cast in the action by reason of the willful neglect or misconduct of his attorney, his attorney shall be liable for the costs which may have accrued in the case. In like manner, if any defendant is cast in the action by reason of the willful neglect or misconduct of his attorney, his attorney shall be liable for the costs thereof. (Laws 1799, Cobb's 1851 Digest, p. 505; Code 1863, § 3602; Code 1868, § 3626; Code 1873, § 3676; Code 1882, § 3676; Civil Code 1895, § 5386; Civil Code 1910, § 5981; Code 1933, § 24-3402.)

### JUDICIAL DECISIONS

**Attorney's lack of preparation as leading to dismissal.** — Evidence of plaintiff's attorney's failure to prepare adequately for a trial which the attorney had demanded and of which the attorney had ample notice supplied a basis for the trial court's determination that the involun-

tary dismissal of the appellant's case was due to the willful neglect or misconduct of the plaintiff's attorney so as to justify the imposition of costs against the attorney personally. *Cramer, Inc. v. Southeastern Office Furn. Whsle. Co.*, 171 Ga. App. 514, 320 S.E.2d 223 (1984).



## RESEARCH REFERENCES

**ALR.** — Attorney's liability for negligence in preparing or conducting litigation, 45 ALR2d 5; 6 ALR4th 342.

Measure and elements of damages recoverable for attorney's negligence with respect to maintenance or prosecution of litigation or appeal, 45 ALR2d 62.

Legal malpractice in connection with

attorney's withdrawal as counsel, 6 ALR4th 342.

Measure and elements of damages recoverable for attorney's negligence in preparing or conducting litigation-Twentieth Century cases, 90 ALR4th 1033.

Legal malpractice: negligence or fault of client as defense, 10 ALR5th 828.

**9-15-8. Liability for costs of witnesses of adverse party.**

No party plaintiff or defendant shall be liable for the costs of any witness of the adverse party unless the witness is subpoenaed, sworn, and examined on the trial of the case or unless the plaintiff voluntarily dismisses his case before trial. No party shall be liable for the costs of more than two witnesses to the same point unless the court certifies that the question at issue was of such a character as rendered a greater number of witnesses necessary. (Laws 1799, Cobb's 1851 Digest, p. 277; Code 1863, § 3608; Code 1868, § 3632; Code 1873, § 3682; Code 1882, § 3682; Civil Code 1895, § 5392; Civil Code 1910, § 5990; Code 1933, § 24-3408.)

## JUDICIAL DECISIONS

**Witnesses compelled to testify.** — When a witness is compelled to testify before the court, the party cast in the suit is liable to pay the fees of a limited number of them. *Almand v. Atlantic Coast Line R.R.*, 118 Ga. 468, 45 S.E. 302 (1903).

**Incompetent witnesses.** — If a witness is rejected for incompetency, the cost can be only collected from the party at whose instance the incompetent witness was subpoenaed. *Crozier v. Berry*, 27 Ga. 346 (1859).

**Costs are not allowed for more than two witnesses on one point.** *Holmes v. Huguley*, 136 Ga. 758, 72 S.E. 38 (1911).

**If witnesses not sworn, costs cannot be taxed.** *Mason & Waldrip v. Dean & Nash*, 10 Ga. 443 (1851).

**Witnesses must be subpoenaed, sworn, and examined on trial.** *Hix v. Gully*, 113 Ga. 83, 38 S.E. 399 (1901).

**Expenses of taking depositions are not included as costs.** *Almand v. Atlantic Coast Line R.R.*, 118 Ga. 468, 45 S.E. 302 (1903).

**Conclusion that expenses in discovery are not taxed as costs** flows from

the reasoning of this section which implies that the expenses incident to actual trial testimony are what is meant to be included in the costs. *City of Atlanta v. International Ass'n of Firefighters Local 134*, 240 Ga. 24, 239 S.E.2d 353 (1977).

**Agreement between parties as to costs.** — When parties entered into agreement as to payment of costs, it was proper for the judge to refuse an entry *nunc pro tunc* for costs on account of the agreement. *Calhoun v. Mayor of Atlanta*, 42 Ga. 187 (1871).

When there is settlement without trial and an agreement as to witness fees, it is otherwise. *Southern Ry. v. Dalton Tel. Co.*, 145 Ga. 189, 88 S.E. 940 (1916).

**Plaintiff must pay costs before renewal.** *Holmes v. Huguley*, 136 Ga. 758, 72 S.E. 38 (1911).

**Former Civil Code 1895, § 5394 (see now O.C.G.A. § 9-15-11) did not warrant taxing costs for witness fees** when the party would not be liable under former Civil Code 1895, § 5392 (see now O.C.G.A. § 9-15-8). *Hix v. Gully*, 113 Ga. 83, 38 S.E. 399 (1901).



RESEARCH REFERENCES

**ALR.** — Validity of contract to testify, 41 ALR 1322; 45 ALR 1423.

Power of court which appoints or employs expert witnesses to tax their fees as costs, 39 ALR2d 1376.

Right of witness detained in custody for future appearance to fees for such detention, 50 ALR2d 1439.

Allowance, as taxable costs, of witness fees and mileage of stockholders, directors, officers, and employees of corporate litigant, 57 ALR2d 1243.

Allowance of mileage or witness fees with respect to witnesses who were not called to testify or not permitted to do so when called, 22 ALR3d 675.

9-15-9. Costs when recovery on contract is less than \$50.00.

When any action ex contractu is brought in the superior or state court and the verdict of the jury, unreduced by setoff or payment pending the action, is for a sum under \$50.00, the defendant shall not be charged with more costs than would have necessarily accrued if the case had been heard before a magistrate. The remainder of the court costs shall be paid by the plaintiff and may be retained out of the sum recovered by the plaintiff and, if that is insufficient, judgment shall be entered by the court against the plaintiff for the balance. (Laws 1809, Cobb's 1851 Digest, p. 505; Code 1863, § 3604; Code 1868, § 3628; Code 1873, § 3678; Code 1882, § 3678; Civil Code 1895, § 5388; Civil Code 1910, § 5983; Code 1933, § 24-3404; Ga. L. 1983, p. 884, § 4-1.)

**Cross references.** — For further provisions regarding recovery of expenses of litigation in contract actions, see § 13-6-11.

JUDICIAL DECISIONS

**This section does not apply to torts.** Lea v. Harris, 88 Ga. 236, 14 S.E. 566 (1891).

**Cited** in Robinson v. Towns, 30 Ga. 818 (1860); Officers of Court v. Hines & Hobbs,

33 Ga. 516 (1863); Smith v. Shaffer & Ham, 65 Ga. 459 (1880); Graham v. City of Baxley, 117 Ga. 42, 43 S.E. 405 (1903); Parker v. Rexall Drug Co., 132 Ga. App. 32, 207 S.E.2d 617 (1974).

9-15-10. Costs in personal actions when damages are less than \$10.00.

(a) In all actions for slanderous words, in any court having jurisdiction of the same, if the jury renders a verdict under \$10.00, the plaintiff shall have and recover no more costs than damages.

(b) In actions of assault and battery and in all other personal actions wherein the jury upon the trial thereof finds the damages to be less than \$10.00, the plaintiff shall recover no more costs than damages unless the judge, at the trial thereof, finds and certifies on the record that an aggravated assault and battery was proved. (Laws 1767, Cobb's 1851 Digest, p. 504; Code 1863, §§ 3606, 3607; Code 1868, §§ 3630,



3631; Code 1873, §§ 3680, 3681; Code 1882, §§ 3680, 3681; Civil Code 1895, §§ 5390, 5391; Civil Code 1910, § 5984; Code 1933, § 24-3405.)

### JUDICIAL DECISIONS

**This section applies to actual torts to the person** and not to suits for mere negligent injury. *Saunders v. Parker*, 20 Ga. App. 292, 93 S.E. 103 (1917).

**This section does not apply to trover when the plaintiff elects to take damages.** *Grant v. General Baptist Convention*, 10 Ga. App. 392, 73 S.E. 422 (1912).

**When plea of justification is filed** in an action for personal injuries, a verdict for \$1.00 and costs would not carry all of the costs of the action, and to such a verdict the plaintiff is entitled when the plea of justification fails. *Conley v. Arnold*,

93 Ga. 823, 20 S.E. 762 (1894). See also *Kirby v. Thompson*, 138 Ga. 544, 75 S.E. 625 (1912).

**Verdict inadequate.** — When the verdict establishes liability and the extent of damage is proved to amount to \$107.00, a verdict for \$1.00 is inadequate, and not sufficient even to carry nominal damages. *Travers v. Macon Ry. & Light Co.*, 19 Ga. App. 15, 90 S.E. 732 (1916).

**Cited in** *Hardin v. Lumpkin*, 5 Ga. 452 (1848); *Atlantic Coast Line R.R. v. Stephens*, 14 Ga. App. 173, 80 S.E. 516 (1914).

### 9-15-11. Inclusion of costs in judgment; itemization and endorsement on execution.

When a case is disposed of, the costs, including fees of witnesses, shall be included in the judgment against the party voluntarily dismissing, being involuntarily dismissed, or cast in the action. It shall be the duty of the clerk of the court, of the magistrate, or of any other officer who may issue an execution to endorse on the execution at the time it is issued the date and amount of the judgment, the items of the bill of cost, written in words, and the amount of each item distinctly stated in figures. No costs or items of costs shall in any case be demanded by any officer unless they are itemized and endorsed as provided in this Code section. (Orig. Code 1863, § 3610; Code 1868, § 3635; Ga. L. 1870, p. 67, § 1; Code 1873, § 3685; Code 1882, § 3685; Civil Code 1895, § 5394; Civil Code 1910, § 5992; Code 1933, § 24-3410; Ga. L. 1983, p. 884, § 4-1.)

### JUDICIAL DECISIONS

**Judgment assessing costs of court against one of parties is final judgment** which the trial court is without authority to enter on an interlocutory matter. *Wood v. Delta Ins. Co.*, 101 Ga. App. 720, 114 S.E.2d 883 (1960).

**This section makes it duty of clerk to assess costs;** and in a case when the clerk makes such an assessment the defendant is bound by the assessment until

the assessment is reversed and set aside. *Cary v. Simpson & Harper*, 15 Ga. App. 280, 82 S.E. 918 (1914).

**Costs as part of writ.** — When an officer issuing an execution attaches to the writ a separate paper having thereon a bill of the costs itemized in the manner prescribed in this section, this paper becomes a part of the execution itself and the action thus taken by the clerk is



equivalent to properly endorsing the bill of costs thereon. *Hix v. Gully*, 113 Ga. 83, 38 S.E. 399 (1901).

**Receipt in full as prima facie evidence of payment.** — When the clerk gives a receipt for the costs “in full” it is prima facie evidence that all the costs have been paid. *Cary v. Simpson & Harper*, 15 Ga. App. 280, 82 S.E. 918 (1914).

**When this section is fully complied with, it is not error to overrule motion to dismiss levy.** *Connell v. Officers of Court*, 145 Ga. 231, 88 S.E. 927 (1916).

**When levy is dismissed,** the court has no power to order goods levied or sold to meet expenses incurred by the sheriff on levying on goods nor has the sheriff any lien on the goods. *Ward v. Barnes*, 95 Ga. 103, 22 S.E. 133 (1894).

**When clerk agrees to take certain amount, such sum only can be taxed.** — When clerk of superior court issued an execution for the amount of costs due the clerk for transcript of record of the case, and accepted from them, in full settlement, an amount less than that due and for which execution had been issued, after a reversal by the Supreme Court of the judgment excepted to, the plaintiffs in error were not entitled to a writ of mandamus to compel the clerk to issue an

execution against the defendant in error for an amount of such costs greater than the amount the plaintiffs actually paid. *Greer v. Whitley*, 135 Ga. 333, 69 S.E. 479 (1910).

**Construing section distinguishing retraxit and dismissal or discontinuance.** — Former Civil Code 1910, §§ 5624 and 5625 (see now O.C.G.A. § 9-2-62) must be construed in connection with former Civil Code 1910, § 5992 (see now O.C.G.A. § 9-15-11). When a case was disposed of, the costs of the case, including fees of witnesses, should be included in the judgment against the party dismissing, being nonsuited, or cast. *Dickson v. Hutchinson*, 173 Ga. 644, 161 S.E. 139 (1931).

**O.C.G.A. § 9-15-2 does not relieve an indigent inmate from paying costs** required under O.C.G.A. §§ 9-15-1 and 9-15-11. *Newsome v. Graham*, 254 Ga. 711, 334 S.E.2d 183 (1985).

**Cited** in *Smith v. Bell*, 107 Ga. 800, 33 S.E. 684, 73 Am. St. R. 151 (1899); *Land v. Jolley*, 175 Ga. 788, 166 S.E. 217 (1932); *Hollomon v. Humber*, 180 Ga. 470, 179 S.E. 365 (1935); *Hartsfield Co. v. Shoaf*, 184 Ga. 378, 191 S.E. 693 (1937); *Garrett v. Board of Comm’rs*, 215 Ga. 351, 110 S.E.2d 626 (1959); *Paul v. Paul*, 236 Ga. 692, 225 S.E.2d 45 (1976).

## RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 7C Am. Jur. Pleading and Practice Forms, Costs, § 74.

**ALR.** — Validity of contract to testify, 41 ALR 1322; 45 ALR 1423.

Power of court which appoints or employs expert witnesses to tax their fees as costs, 39 ALR2d 1376.

Award of costs to defendant on causes of action where claims of some, but not all, of coplaintiffs were successful, 68 ALR2d 1058.

Taxable costs and disbursements as including expenses for bonds incident to steps taken in action, 90 ALR2d 448.

Dismissal of plaintiff’s action as entitling defendant to recover attorneys’ fees or costs as “prevailing party” or “successful party,” 66 ALR3d 1087.

Who is the “successful party” or “prevailing party” for purposes of awarding costs where both parties prevail on affirmative claims, 66 ALR3d 1115.

## 9-15-12. Liability of plaintiff and attorney for costs when execution returned unsatisfied.

If execution issues on a judgment recovered by the plaintiff against the defendant and the executing officer returns the same marked “No property to be found,” a fi. fa. may issue against the plaintiff for the



purpose of recovering the costs from him; and, if the plaintiff resides outside the state, the fi. fa. shall issue against his attorney also. (Laws 1842, Cobb's 1851 Digest, p. 507; Code 1863, § 3611; Code 1868, § 3636; Code 1873, § 3686; Code 1882, § 3686; Civil Code 1895, § 5395; Civil Code 1910, § 5993; Code 1933, § 24-3411.)

### JUDICIAL DECISIONS

**Attorney for nonresident defendant is liable for costs if** the costs cannot be collected from the attorney's client. *Officers of Court v. Hines & Hobbs*, 33 Ga. 516 (1963).

**Liability of administrator.** — When an administrator sued and recovered a judgment upon which the costs could not be collected from defendants and a fi. fa. issued against the administrator for costs, such fi. fa. could not be levied on property in hands that the heir received on settle-

ment. *Daniel v. Hollingshead*, 16 Ga. 190 (1854).

**As to priority between execution for costs and security deed**, see *Jordan v. Central City Loan & Trust Ass'n*, 108 Ga. 495, 34 S.E. 132 (1899).

**Inclusion of attorney's fees in fi. fa. is illegal when** there has been no judgment or adjudication in favor of the attorney for such fees upon which to base the execution. *Royal Fin. Co. v. Knipher*, 106 Ga. App. 712, 127 S.E.2d 922 (1962).

### 9-15-13. Judgment and execution against attorney for costs.

In all cases in which it is made to appear that an attorney is liable for costs, the court shall, on motion, order a judgment and execution against him for the same. (Orig. Code 1863, § 3612; Code 1868, § 3637; Code 1873, § 3687; Code 1882, § 3687; Civil Code 1895, § 5396; Civil Code 1910, § 5994; Code 1933, § 24-3412.)

### JUDICIAL DECISIONS

**Ruling considered final.** — Ruling of the trial court on all issues of fact concerning ability of the party to pay costs or give bond is final and is not subject to review. *Grace v. Caldwell*, 231 Ga. 407, 202 S.E.2d 49 (1973); *Williams v. State*, 147 Ga. App. 632, 249 S.E.2d 694 (1978); *Bray v. State*, 152 Ga. App. 404, 263 S.E.2d 184 (1979).

**Failure to show inability to pay.** — Since the appellant has \$74.11 on deposit with the state prison and there was no restriction on the appellant's withdrawing the appellant's money, the court properly found that the appellant was not relieved of the necessity of paying the \$20.00 costs of filing a habeas corpus motion as the appellant failed to show that because of poverty the appellant was unable to pay the costs. *Whitus v. Caldwell*, 229 Ga. 604, 193 S.E.2d 613 (1972).

**In order to relieve the plaintiff in**

**error from payment of costs in the Supreme Court**, it is necessary that a proper pauper affidavit shall be filed with the clerk of the trial court before the bill of exceptions (see now O.C.G.A. §§ 5-6-49 and 5-6-50) and transcript of the record are transmitted to this court. *New York Life Ins. Co. v. Hartford Accident & Indem. Co.*, 181 Ga. 55, 181 S.E. 755 (1935).

**When trial judge's impartiality in question.** — Remarks made by a trial judge which clearly indicate that the judge had formed an opinion that the defendant should not be allowed a free transcript based on the defendant's pauper's affidavit under O.C.G.A. § 9-15-2, prior to a hearing on the issue, reasonably places in question the trial judge's impartiality on the issue; and it is error for the judge to fail to recuse oneself and to hear



and decide the cases. *Ferry v. State*, 147 Ga. App. 642, 249 S.E.2d 692 (1978).

**Justice of peace should be disqualified.** — Since a justice of the peace has a direct financial interest in whether or not a party must pay court costs, the justice of the peace should be disqualified from deciding the truthfulness of a pauper's affidavit filed in that court, unless such disqualification is waived. *Taylor v. Public Convalescent Serv.*, 245 Ga. 805, 267 S.E.2d 242 (1980).

**Error in denial of motion to proceed in forma pauperis on appeal is moot when record is transferred for consideration on appeal.** *Taylor v. Public Convalescent Serv.*, 245 Ga. 805, 267 S.E.2d 242 (1980).

**It is error, in absence of traverse affidavit, to deny motion to proceed in forma pauperis.** *Martin v. State*, 151 Ga. App. 9, 258 S.E.2d 711 (1979), cert. denied, 454 U.S. 833, 102 S. Ct. 133, 70 L. Ed. 2d 112 (1981).

**When defendant is out on bond.** — It is error to require the defendant, who had filed a pauper's affidavit, to pay the cost of the original transcript without any hearing thereon simply because the defendant was out on bond. *Clay v. State*, 122 Ga. App. 677, 178 S.E.2d 331 (1970).

**Cited in** *Samples v. Samples*, 107 Ga. App. 478, 130 S.E.2d 504 (1963); *Harper v. Burgess*, 225 Ga. 420, 169 S.E.2d 297 (1969); *Hubbard v. Farmers Bank*, 153 Ga. App. 497, 265 S.E.2d 845 (1980).

## OPINIONS OF THE ATTORNEY GENERAL

**Clerk of superior court has no discretion as to acceptance and transmittal of pauper's affidavit.** 1965-66 Op. Att'y Gen. No. 66-169.

**Probate court costs.** — Purpose of statutory provisions allowing indigent persons relief from the filing of deposits such as Ga. L. 1955, p. 584, §§ 1 and 2 and former Code 1933, §§ 24-716 and 24-1716.1 (see now O.C.G.A. §§ 9-15-2, 15-9-60, and 15-9-61) was to provide an indigent access to the courts, and it did

not appear that the General Assembly intended to permanently relieve a litigant from responsibility to pay any probate court costs regardless of the litigant's ultimate ability to pay such costs; accordingly, a party allowed to proceed in forma pauperis without the filing of such an advance cost deposit could be required to pay court costs if the party later became able to pay those costs by virtue of receipt of estate funds through probate proceedings. 1978 Op. Att'y Gen. No. U78-48.

## RESEARCH REFERENCES

**ALR.** — Necessity of attorney on contingent fee making pauper's oath in support of suit in forma pauperis, 33 ALR 731.

Right of indigent to proceed in marital action without payment of costs, 52 ALR3d 844.

What constitutes order made pursuant to state domestic relations law for purposes of qualified domestic relations order exception to antialienation provision of Employee Retirement Income Security Act of 1974 (29 USCS § 1056(d)), 79 ALR4th 1081.

## 9-15-14. Litigation costs and attorney's fees assessed for frivolous actions and defenses.

(a) In any civil action in any court of record of this state, reasonable and necessary attorney's fees and expenses of litigation shall be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim,



defense, or other position. Attorney's fees and expenses so awarded shall be assessed against the party asserting such claim, defense, or other position, or against that party's attorney, or against both in such manner as is just.

(b) The court may assess reasonable and necessary attorney's fees and expenses of litigation in any civil action in any court of record if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under Chapter 11 of this title, the "Georgia Civil Practice Act." As used in this Code section, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

(c) No attorney or party shall be assessed attorney's fees as to any claim or defense which the court determines was asserted by said attorney or party in a good faith attempt to establish a new theory of law in Georgia if such new theory of law is based on some recognized precedential or persuasive authority.

(d) Attorney's fees and expenses of litigation awarded under this Code section shall not exceed amounts which are reasonable and necessary for defending or asserting the rights of a party. Attorney's fees and expenses of litigation incurred in obtaining an order of court pursuant to this Code section may also be assessed by the court and included in its order.

(e) Attorney's fees and expenses under this Code section may be requested by motion at any time during the course of the action but not later than 45 days after the final disposition of the action.

(f) An award of reasonable and necessary attorney's fees or expenses of litigation under this Code section shall be determined by the court without a jury and shall be made by an order of court which shall constitute and be enforceable as a money judgment.

(g) Attorney's fees and expenses of litigation awarded under this Code section in a prior action between the same parties shall be treated as court costs with regard to the filing of any subsequent action.

(h) This Code section shall not apply to proceedings in magistrate courts. However, when a case is appealed from the magistrate court, the appellee may seek litigation expenses incurred below if the appeal lacks substantial justification. (Code 1981, § 9-15-14, enacted by Ga. L. 1986, p. 1591, § 1; Ga. L. 1987, p. 397, § 1; Ga. L. 1989, p. 437, § 1; Ga. L. 1994, p. 856, § 2; Ga. L. 1997, p. 689, § 1; Ga. L. 2001, p. 967, § 1.)



**Cross references.** — Duty of lawyer to client, Rules and Regulations for the Organization and Government of the State Bar of Georgia, EC 7-4.

**Law reviews.** — For annual survey of law of torts, see 38 Mercer L. Rev. 351 (1986). For annual survey of trial practice and procedure, see 38 Mercer L. Rev. 383 (1986). For article, “On with the Old!,” see 24 Ga. St. B.J. 13 (1987). For article, “The Civil Jurisdiction of State and Magistrate Courts,” see 24 Ga. St. B.J. 29 (1987). For article, “Nonjudicial Foreclosures in Georgia Revisited,” see 24 Ga. St. B.J. 43 (1987). For article, “The Torok Tort: Recovery for Abusive Litigation,” see 23 Ga. St. B.J. 84 (1987). For article, “Litigators on Trial: Professionalism Implications of *Yost v. Torok*,” see 23 Ga. St. B.J. 88 (1987). For article, “Battling the Many-Headed Hydra: Abusive Litigation Law in Georgia,” see 25 Ga. St. B.J. 65 (1988). For article, “*Yost v. Torok*: Taking Legal Ethics Seriously,” see 4 Ga. St. U.L. Rev. 23 (1988). For article, “Setting the Fee When the Client Discharges a Contingent Fee Attorney,” see 41 Emory L.J. 367 (1992). For annual survey on legal ethics, see 44 Mercer L. Rev. 281 (1992). For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 1 (1997). For annual survey article on real property law, see 50 Mercer L. Rev. 307 (1998). For survey article on domestic relations cases for the period from June 1, 2002, through May 31, 2003, see 55 Mercer L. Rev. 223 (2003). For annual survey of construction law, see 56

Mercer L. Rev. 109 (2004). For annual survey of domestic relations law, see 56 Mercer L. Rev. 221 (2004). For annual survey of domestic relations law, see 58 Mercer L. Rev. 133 (2006). For article, “Of Frivolous Litigation and Runaway Juries: A View from the Bench,” see 41 Ga. L. Rev. 431 (2007). For survey article on trial practice and procedure, see 59 Mercer L. Rev. 423 (2007). For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008). For annual survey on appellate practice and procedure, see 61 Mercer L. Rev. 31 (2009). For annual survey on trial practice and procedure, see 61 Mercer L. Rev. 363 (2009). For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010). For annual survey on domestic relations law, see 64 Mercer L. Rev. 121 (2012). For annual survey on legal ethics, see 64 Mercer L. Rev. 189 (2012). For annual survey on trial practice and procedure, see 64 Mercer L. Rev. 305 (2012). For article, “Division of Labor: The Modernization of the Supreme Court of Georgia and Concomitant Workload Reduction Measures in the Court of Appeals,” see 30 Ga. St. U.L. Rev. 925 (2014). For article on domestic relations, see 66 Mercer L. Rev. 65 (2014).

For note, “Abusive Litigation in Georgia: Deterrence and Compensation,” see 3 Ga. St. U.L. Rev. 303 (1987).

For case comment, “*Yost v. Torok* and Abusive Litigation: A New Tort to Solve an Old Problem,” see 21 Ga. L. Rev. 429 (1986).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- PROCEDURE
- APPLICATION
- APPEALS

General Consideration

**Purpose.** — Damages authorized by O.C.G.A. § 9-15-14 and, to a lesser extent, those authorized by *Yost v. Torok*, 256 Ga. 92, 344 S.E.2d 414 (1986), are intended not merely to punish or deter litigation abuses but also to recompense litigants

who are forced to expend their resources in contending with claims, defenses, or other positions with respect to which there exists such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim,



**General Consideration (Cont'd)**

defense, or other position. *Ferguson v. City of Doraville*, 186 Ga. App. 430, 367 S.E.2d 551, cert. denied, 186 Ga. App. 918, 367 S.E.2d 551 (1988), overruled on other grounds, *Vogtle v. Coleman*, 259 Ga. 115, 376 S.E.2d 860 (1989).

O.C.G.A. § 9-15-14 does not create a tort claim for “abusive litigation,” which would be pleaded pursuant to the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, and submitted to a jury for the resolution of disputed questions of fact, the statute merely makes substantive and procedural provision for a trial court, sitting as the trier of fact, to make an award of attorney’s fees and expenses of litigation as a sanction against certain enumerated abuses. *Deavours v. Hog Mt. Creations, Inc.*, 207 Ga. App. 557, 428 S.E.2d 388 (1993), aff’d in part rev’d in part on other grounds, 263 Ga. 796, 439 S.E.2d 643 (1994).

**Limited scope of section.** — Now that the common law action has been codified in O.C.G.A. § 51-7-80 et seq., O.C.G.A. § 9-15-14 remains effective only when the claim is for attorneys’ fees or expenses of litigation. *Westinghouse Credit Corp. v. Hall*, 144 Bankr. 568 (S.D. Ga. 1992).

**No constitutional mandate that attorney’s fees be awarded only pursuant to O.C.G.A. § 9-15-14 or O.C.G.A. § 13-6-11.** — Trial court erred in finding that the Tort Reform Act of 2005, O.C.G.A. § 9-11-68, violated Ga. Const. 1983, Art. I, Sec. I, Para. XII, since the court permitted the recovery of attorney’s fees absent the prerequisite showings of either O.C.G.A. § 9-15-14 or O.C.G.A. § 13-6-11 because there was no constitutional requirement that attorney’s fees be awarded only pursuant to § 9-15-14 or § 13-6-11; in Georgia, attorney’s fees are recoverable when authorized by some statutory provision or by contract, and § 9-11-68 is such a statutory provision authorizing the recovery of attorney’s fees under specific circumstances. *Smith v. Baptiste*, 287 Ga. 23, 694 S.E.2d 83 (2010).

**Construction with O.C.G.A. § 13-6-11.** — O.C.G.A. § 9-15-14 applies to conduct occurring during the litigation

and permits an attorney fees award for frivolous claims, and O.C.G.A. § 13-6-11 permits an award of attorney fees if the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense and applies to conduct arising from the underlying transaction; O.C.G.A. § 13-6-11 has been held to require that a party acting in bad faith pay the full price for losing. *Trotter v. Summerour*, 273 Ga. App. 263, 614 S.E.2d 887 (2005).

**Any party entitled to recover.** — O.C.G.A. § 9-15-14 does not limit recovery to a certain party, but permits any party to recover from another party who has “unnecessarily expanded the proceeding by ... improper conduct, including, but not limited to, abuses of discovery.” *Betallic, Inc. v. Deavours*, 263 Ga. 796, 439 S.E.2d 643 (1994).

**Pro se parties may not recover.** — In a dismissal for failure to prosecute, a trial court erred in awarding attorney fees to pro se defendants under O.C.G.A. § 9-15-14. *Chrysler Financial Services Americas, LLC v. Benjamin*, 325 Ga. App. 579, 754 S.E.2d 157 (2014).

**Awards not directly to attorney.** — Any award of fees or expenses under O.C.G.A. § 9-15-14(a) “shall be awarded to any party” and not directly to the attorney for the party. The court may, of course, specify the amounts due to each attorney or law firm, but the award itself, as specified in the statute, is for the benefit of the party litigant. *Brewer v. Paulk*, 296 Ga. App. 26, 673 S.E.2d 545 (2009).

**Re-filing did not divest original court of jurisdiction to decide motion.** — Forty-five day period of O.C.G.A. § 9-15-14 provided an exception to post-judgment jurisdiction as a limited “window of opportunity” to seek sanctions; the re-filing of an action after a party had timely moved for attorney’s fees but before the original court had the opportunity to rule did not divest the original court of jurisdiction to decide the motion. *Harris v. Werner*, 278 Ga. App. 166, 628 S.E.2d 230 (2006).

**Prevailing party is not perforce entitled to an award of attorney’s fees** under subsection (a) of O.C.G.A. § 9-15-14. *Hyre v. Denise*, 214 Ga. App. 552, 449 S.E.2d 120 (1994).



Successful plaintiff was not entitled to award of attorney fees since the plaintiff neither asserted facts giving rise to a claim under O.C.G.A. § 9-15-14 in the plaintiff's motion nor supported the plaintiff's motion with evidence establishing such a claim. *Williams v. Binion*, 227 Ga. App. 893, 490 S.E.2d 217 (1997).

Applicant is not entitled to attorney fees merely because summary judgment was granted in the applicant's favor. *Brown v. Kinser*, 218 Ga. App. 385, 461 S.E.2d 564 (1995).

**Frivolous litigation sanctions.** — Party against whom frivolous litigation sanctions are sought has a right to be heard before such sanctions are imposed. *Glass v. Glover*, 241 Ga. App. 838, 528 S.E.2d 262 (2000).

**Fees for unsuccessful claim not recoverable.** — Trial court must limit sanctions to fees incurred because of sanctionable conduct, so fees incurred in pursuing an unsuccessful claim would not be recoverable. *Harkleroad v. Stringer*, 231 Ga. App. 464, 499 S.E.2d 379 (1998).

When a construction company's counterclaims alleging abusive litigation under O.C.G.A. §§ 9-15-14 and 51-7-80 et seq., alleged in the pleading that the claims constituted "notice" to assert such claims under O.C.G.A. § 51-7-81, the trial court properly determined that the claims were not counterclaims and, accordingly, dismissed the claims for want of subject matter jurisdiction under O.C.G.A. § 9-11-12(h)(3); it was also found that the required notice provided in O.C.G.A. § 51-7-84(b) was not provided prior to the filing of a claim, nor was the prior litigation ended in the defendants' favor, both of which were requirements in order to bring such a claim, and disposing of the claim under a summary judgment analysis, pursuant to O.C.G.A. § 9-11-56, was proper. *Langley v. Nat'l Labor Group, Inc.*, 262 Ga. App. 749, 586 S.E.2d 418 (2003).

In a homeowner's breach of contract action against a builder, a trial court's refusal to award attorney's fees to the builder was upheld because the builder did not prevail on any of the builder's motions or claims. *Sierra-Corral Homes, LLC v. Pourreza*, 308 Ga. App. 543, 708 S.E.2d 17 (2011), cert. denied, No.

S11C1121, 2011 Ga. LEXIS 584 (Ga. 2011).

**Power to award attorney fees sua sponte is contingent.** — While subsection (b) of O.C.G.A. § 9-15-14 vests the trial court with the discretion to award attorney's fees sua sponte, that power is contingent upon the trial court finding lack of substantial justification or unnecessary expansion of the proceeding by improper conduct. *Market Ins. Corp. v. IHM, Inc.*, 192 Ga. App. 441, 385 S.E.2d 307, cert. denied, 192 Ga. App. 902, 385 S.E.2d 307 (1989), overruled on other grounds, *Fowler v. Vineyard*, 261 Ga. 454, 405 S.E.2d 678 (1991); *Hardwick-Morrison Co. v. Mayland*, 206 Ga. App. 426, 425 S.E.2d 416 (1992); *Montag v. Sutherland*, 230 Ga. App. 692, 498 S.E.2d 86 (1998).

**Request for attorney's fees proper.** — Homebuyers and their attorney could have discovered that the buyers did not have a valid claim against two people who sold them a house or against the sellers' real estate agent or the agent's brokerage firm by exercising due diligence before suit was filed, and the trial court did not abuse the court's discretion by awarding the sellers, their agent, and the brokerage firm attorney's fees and costs or by ruling that the buyers' attorney was jointly and severally liable for paying that award. *Bircoll v. Rosenthal*, 267 Ga. App. 431, 600 S.E.2d 388 (2004).

**Recovery not available to federal litigants.** — Federal courts interpreting O.C.G.A. § 9-15-14 have found the statute to apply only to courts of record of the State of Georgia; that section is unavailable to civil litigants in federal court. *Westinghouse Credit Corp. v. Hall*, 144 Bankr. 568 (S.D. Ga. 1992).

O.C.G.A. § 9-15-14 is limited to courts of record of the State of Georgia. Arguably, claims under *Yost v. Torok*, 256 Ga. 92, 344 S.E.2d 414 (1986), are also so limited. *Majik Mkt. v. Best*, 684 F. Supp. 1089 (N.D. Ga. 1987).

O.C.G.A. § 9-15-14 is unavailable to civil litigants in federal court. *Bruce v. Wal-Mart Stores, Inc.*, 699 F. Supp. 905 (N.D. Ga. 1988); *Thomas v. Brown*, 708 F. Supp. 336 (N.D. Ga. 1989); *Edwards v. Associated Bureaus, Inc.*, 128 F.R.D. 682 (N.D. Ga. 1989).



**General Consideration (Cont'd)**

**Award of attorney's fees improper.** — Attorney's fees incurred in connection with appellate proceedings are not recoverable under O.C.G.A. § 9-15-14, and thus a trial court's award of attorney's fees to a wife based, in part, on a husband's prior appeal was improper. *McGahee v. Rogers*, 280 Ga. 750, 632 S.E.2d 657 (2006).

Because there was no evidence that a plaintiff was given an opportunity to challenge the basis on which the fees were assessed in favor of the defendant, that portion of the trial court's judgment that assessed attorney fees had to be vacated, and the matter remanded for an evidentiary hearing regarding whether the defendant was entitled to an award under O.C.G.A. § 9-15-14(b) based on the plaintiff's misconduct, and if so, the amount of the award. *Honkan v. Honkan*, 283 Ga. App. 522, 642 S.E.2d 154 (2007).

Trial court erred in awarding attorney fees and costs as a sanction against an assisted living facility patient and the patient's counsel for filing suit against the wrong entity; suit had been filed against the entity based on erroneous information received from the DHR, defense counsel failed to provide the patient's counsel with competent evidence that the facility was not the proper defendant until after suit was filed, and there was no evidence that the patient sued the entity for purposes of delay, harassment, or unnecessary expansion of litigation. *Wallace v. Noble Vill. at Buckhead Senior Hous., LLC.*, 292 Ga. App. 307, 664 S.E.2d 292 (2008).

Trial court erred in awarding the defendants attorney fees on grounds that a complaint was frivolous on the complaint's face as the court's grant of summary judgment to the defendants on two of the five claims was reversed on appeal and because the trial court failed to cite O.C.G.A. § 9-15-14 or make the necessary findings, including that the fees were reasonable. *Walker v. Walker*, 293 Ga. App. 872, 668 S.E.2d 330 (2008).

Record revealed facts supporting justifiable issues of law in the married couple's suit against a clergyman for, inter alia, breach of fiduciary duty/confidential rela-

tionship under O.C.G.A. § 23-2-58 and loss of consortium; thus, an award of attorney fees was reversible error and any award that may have been appropriate needed to be reconsidered remembering that the trial court must limit the fees award "to those fees incurred because of [the] sanctionable conduct" and that "lump sum" or unapportioned attorney fees awards are not permitted in Georgia. *Brewer v. Paulk*, 296 Ga. App. 26, 673 S.E.2d 545 (2009).

Attorney fees award for a father pursuant to O.C.G.A. § 9-15-14(b) was improper because the mother's action seeking a paternity finding and child support was not frivolous despite the parties' artificial insemination agreement which precluded the father's responsibility; although the trial court ruled in the father's favor on the mother's underlying claim, there was no controlling authority directly on the question of the enforceability of an artificial insemination contract at the time the mother filed the claim, and the mother cited authority that arguably supported a different conclusion from that reached by the trial court on the public policy question, specifically Georgia authority precluding parents from waiving by agreement a child's right to support. *Brown v. Gadson*, 298 Ga. App. 660, 680 S.E.2d 682 (2009).

Trial court erred in awarding a father attorney fees because as parties opposing a claim for attorney fees, the grandparents had a basic right to confront and challenge testimony as to the value and need for legal services and the record did not show that the grandparents were afforded such an opportunity. *Srader v. Midkiff*, 303 Ga. App. 514, 693 S.E.2d 856 (2010).

Since the superior court's order awarding attorney fees to the teacher did not specify the subsection of O.C.G.A. § 9-15-14 under which the order was made and did not contain the findings necessary to support such an award, the award had to be vacated and the case remanded to the superior court for consideration of the issue under the standards of awards pursuant to § 9-15-14, and to enter an award, if appropriate. *Fulton County Sch. Dist. v. Hersh*, 320 Ga. App.



808, 740 S.E.2d 760 (2013).

**Uniform Superior Court Rule 6.2 applied** to the defendant's motion for attorney's fees under O.C.G.A. § 9-15-14 made after dismissal of the case; thus, when the plaintiffs had not filed a response to the motion, the trial court did not err in refusing to permit testimony at the hearing thereon. *Forest Lakes Home Owners Ass'n v. Green Indus., Inc.*, 218 Ga. App. 890, 463 S.E.2d 723 (1995).

**Supreme Court adopted the legislative language of O.C.G.A. § 9-15-14** in delineating a remedy which will merge the common-law claims of malicious abuse and malicious use and to provide for liability in tort to an opposing party who suffers damage from abusive litigation. *Yost v. Torok*, 256 Ga. 92, 344 S.E.2d 414 (1986).

**Law of the case rule applied.** — Trial court properly ruled that an attempt to relitigate sanctionability of the conduct was beyond the scope of the remand directive and thus barred by the law of the case rule. *Harkleroad v. Stringer*, 231 Ga. App. 464, 499 S.E.2d 379 (1998).

As a prior action arising from a real estate contract dispute resolved the issue of attorney fees against an attorney and the attorney's clients pursuant to O.C.G.A. § 9-15-14, that became the law of the case pursuant to O.C.G.A. § 9-11-60(h), such that a second action seeking attorney fees against the attorney was precluded. *Fortson v. Hardwick*, 297 Ga. App. 603, 677 S.E.2d 784 (2009), cert. denied, No. S09C1447, 2009 Ga. LEXIS 407 (Ga. 2009).

**Trial court's improper reference to pending motion required vacation.** — Because the trial court erred in finding that the requirements of class certification under O.C.G.A. § 9-11-23 were moot, concluding that there was no merit to the action, the finding was reversed; further, the case was remanded based on the court's failure to satisfy the specific provisions of § 9-11-23(f)(3) and due to an improper reference to a pending motion for attorney fees under O.C.G.A. § 9-15-14 and unspecified potential conflicts of interest. *Gay v. B. H. Transfer Co.*, 287 Ga. App. 610, 652 S.E.2d 200 (2007).

**Nondischargeability of attorney fee awards in bankruptcy.** — Judgments a

Georgia court entered, which awarded a Chapter 7 debtor's ex-husband \$130,561 pursuant to O.C.G.A. § 9-15-14 to reimburse attorney's fees and litigation costs he incurred in a custody dispute because the debtor filed frivolous claims, were nondischargeable under 11 U.S.C.S § 523 because the debt was owed to a former spouse, the debt was incurred in a domestic relations dispute involving the modification of a judgment in a prior divorce case, and the debt arose from an order of a court of record in accordance with Georgia law. *Rackley v. Rackley (In re Rackley)*, 502 B.R. 615 (Bankr. N.D. Ga. 2013).

**Effect with regard to renewal action.** — Trial court did not err in declining to dismiss the Cobb County, Georgia renewal suit for failure to pay costs in the Fulton County, Georgia action because the defendant had not filed a motion for attorney fees in the original Fulton County suit when the plaintiff filed the renewal suit in Cobb County. *Jarman v. Jones*, 327 Ga. App. 54, 755 S.E.2d 325 (2014).

**Cited in** *Socolow v. Goodman*, 184 Ga. App. 103, 360 S.E.2d 653 (1987); *Moore v. Candler Gen. Hosp.*, 185 Ga. App. 280, 363 S.E.2d 793 (1987); *Sackett v. Wilson*, 258 Ga. 612, 373 S.E.2d 10 (1988); *Southern Ins. Underwriters, Inc. v. Ray*, 188 Ga. App. 469, 373 S.E.2d 236 (1988); *EVI Equip., Inc. v. Northern Ins. Co.*, 188 Ga. App. 818, 374 S.E.2d 788 (1988); *Porter v. Buckeye Cellulose Corp.*, 189 Ga. App. 818, 377 S.E.2d 901 (1989); *Lane v. K-Mart Corp.*, 190 Ga. App. 113, 378 S.E.2d 136 (1989); *Getz Exterminators of Ga., Inc. v. Towe*, 193 Ga. App. 268, 387 S.E.2d 338 (1989); *Bouchard v. Fowler*, 193 Ga. App. 697, 388 S.E.2d 874 (1989); *Coker v. Mosley*, 387 Ga. 135, 387 S.E.2d 135 (1990); *Abrahamsen v. McDonald's Corp.*, 197 Ga. App. 624, 398 S.E.2d 861 (1990); *Oran v. Canada Life Assurance Co.*, 194 Ga. App. 518, 390 S.E.2d 879 (1990); *Colquitt v. Network Rental, Inc.*, 195 Ga. App. 244, 393 S.E.2d 28 (1990); *Madden v. Bellew*, 195 Ga. App. 131, 393 S.E.2d 31 (1990); *Candler v. Wickes Lumber Co.*, 195 Ga. App. 239, 393 S.E.2d 99 (1990); *Stone v. King*, 196 Ga. App. 251, 396 S.E.2d 45 (1990); *Jones v. Bienert*, 197 Ga. App. 554, 398 S.E.2d 830 (1990); *Bedford, Kirschner & Venker v. Goodman*,



**General Consideration (Cont'd)**

197 Ga. App. 858, 399 S.E.2d 723 (1990); McCorkle v. Bignault, 260 Ga. 758, 399 S.E.2d 916 (1991); Souder v. Webb, 198 Ga. App. 419, 401 S.E.2d 630 (1991); Watkins v. M & M Clays, Inc., 199 Ga. App. 54, 404 S.E.2d 141 (1991); Remler v. Shiver, 200 Ga. App. 391, 408 S.E.2d 139 (1991); Rolleston v. Munford, 201 Ga. App. 219, 410 S.E.2d 801 (1991); Hill v. All Seasons Florist, Inc., 201 Ga. App. 870, 412 S.E.2d 619 (1991); S. Hammond Story Agency, Inc. v. Baer, 202 Ga. App. 281, 414 S.E.2d 287 (1991); Adams v. Moffatt, 204 Ga. App. 314, 419 S.E.2d 318 (1992); All South Mini Storage #2, Ltd. v. Woodcon Constr. Servs., 205 Ga. App. 393, 422 S.E.2d 282 (1992); Jones v. Fulton County, 207 Ga. App. 397, 427 S.E.2d 802 (1993); Keeler v. Keeler, 263 Ga. 151, 430 S.E.2d 5 (1993); Dills v. Bohannon, 208 Ga. App. 531, 431 S.E.2d 123 (1993); In re Farmer, 212 Ga. App. 372, 442 S.E.2d 251 (1994); MacDougald v. Phillips, 213 Ga. App. 575, 445 S.E.2d 357 (1994); Deavours v. Hog Mt. Creations, Ins., 213 Ga. App. 337, 445 S.E.2d 579 (1994); McLain Bldg. Materials, Inc. v. Hicks, 215 Ga. App. 1, 449 S.E.2d 369 (1994); Sacha v. Coffee Butler Serv., Inc., 215 Ga. App. 280, 450 S.E.2d 704 (1994); Cobb County Sch. Dist. v. MAT Factory, Inc., 215 Ga. App. 697, 452 S.E.2d 140 (1994); Moore v. Dixon, 264 Ga. 797, 452 S.E.2d 484 (1994); Department of Transp. v. Hardaway Co., 216 Ga. App. 262, 454 S.E.2d 167 (1995); Bass v. Pearson, 219 Ga. App. 488, 466 S.E.2d 17 (1995); Wrightson v. Wrightson, 266 Ga. 493, 467 S.E.2d 578 (1996); Howard v. Sharpe, 266 Ga. 771, 470 S.E.2d 678 (1996); First Union Nat'l Bank v. Cook, 223 Ga. App. 374, 477 S.E.2d 649 (1996); Campbell v. Department of Cors., 268 Ga. 408, 490 S.E.2d 99 (1997); Sommers v. State Comp. Ins. Fund, 229 Ga. App. 352, 494 S.E.2d 82 (1997); Sellers Bros., Inc. v. Imperial Flowers, Inc., 232 Ga. App. 687, 503 S.E.2d 573 (1998); Great W. Bank v. Southeastern Bank, 234 Ga. App. 420, 507 S.E.2d 191 (1998); Brown v. North Am. Specialty Ins. Co., 235 Ga. App. 299, 508 S.E.2d 741 (1998); In re Carter, 235 Ga. App. 551, 510 S.E.2d 91 (1998); Osofsky v. Board of Mayor & Comm'rs, 237 Ga. App. 404, 515 S.E.2d 413 (1998); Glynn-Brunswick Mem. Hosp. Auth. v. Gibbons, 243 Ga. App. 341, 530 S.E.2d 736 (2000); Greer v. Davis, 244 Ga. App. 317, 534 S.E.2d 853 (2000); Cavin v. Brown, 246 Ga. App. 40, 538 S.E.2d 802 (2000); S & A Indus. v. Bank Atlanta, 247 Ga. App. 377, 543 S.E.2d 743 (2000); Segal v. Dorber, 250 Ga. App. 688, 552 S.E.2d 873 (2001); Evans County Bd. of Comm'rs v. Claxton Enter., 255 Ga. App. 656, 566 S.E.2d 399 (2002); Ellis v. Stanford, 256 Ga. App. 294, 568 S.E.2d 157 (2002); Wehner v. Parris, 258 Ga. App. 772, 574 S.E.2d 921 (2002); Caudell v. Toccoa Inn, Inc., 261 Ga. App. 209, 582 S.E.2d 180 (2003); Cotting v. Cotting, 261 Ga. App. 370, 582 S.E.2d 527 (2003); Sangster v. Dujinski, 264 Ga. App. 213, 590 S.E.2d 202 (2003); Fowler v. Cox, 264 Ga. App. 880, 592 S.E.2d 510 (2003); Land v. Boone, 265 Ga. App. 551, 594 S.E.2d 741 (2004); Reece v. Smith, 265 Ga. App. 497, 594 S.E.2d 654 (2004); Marlowe v. Colquitt County, 278 Ga. App. 184, 628 S.E.2d 622 (2006); Huffman v. Armenia, 284 Ga. App. 822, 645 S.E.2d 23 (2007); McKesson Corp. v. Green, 286 Ga. App. 110, 648 S.E.2d 457 (2007); Cothran v. Mehosky, 286 Ga. App. 640, 649 S.E.2d 838 (2007); Hendry v. Wells, 286 Ga. App. 774, 650 S.E.2d 338 (2007); Roofers Edge, Inc. v. Std. Bldg. Co., 295 Ga. App. 294, 671 S.E.2d 310 (2008); Mongerson v. Mongerson, 285 Ga. 554, 678 S.E.2d 891 (2009); Simmons v. Simmons, 288 Ga. 670, 706 S.E.2d 456 (2011); Garmon v. State, 317 Ga. App. 634, 732 S.E.2d 289 (2012); Jarvis v. Jarvis, 291 Ga. 818, 733 S.E.2d 747 (2012); Ga. Dep't of Corr. v. Couch, 322 Ga. App. 234, 744 S.E.2d 432 (2013); Canton Plaza, Inc. v. Regions Bank, Inc., 325 Ga. App. 361, 749 S.E.2d 825 (2013); Deal v. Coleman, 294 Ga. 170, 751 S.E.2d 337 (2013); Newton Timber Co., L.L.L.P. v. Monroe County Bd. of Tax Assessors, 755 S.E.2d 770 (2014); Sewell v. Cancel, 295 Ga. 235, 759 S.E.2d 485 (2014); Bell v. Waffle House, Inc., 331 Ga. App. 443, 771 S.E.2d 132 (2015).

**Procedure**

**Reservation of issue of attorney's fees required.** — When a party enters into an agreement that by its express



language settles all issues raised in a case, that party may no longer maintain an action for attorney's fees. *Waters v. Waters*, 242 Ga. App. 588, 530 S.E.2d 482 (2000).

**Strict compliance required.** — Award of attorney's fees and expenses was vacated since the defendants did not assert the defendants' demand for fees and expenses under O.C.G.A. § 9-15-14 by motion, as is required, but asserted the defendants' demand in the defendants' answer to the plaintiff's complaint. *Glass v. Glover*, 241 Ga. App. 838, 528 S.E.2d 262 (2000).

Because the superior court's order awarding attorney fees to a party under O.C.G.A. § 9-15-14 failed to include the necessary findings of fact to support the award, specifically identifying the conduct upon which the award was made, the award was vacated. Thus, on remand, if the court determined that fees were warranted, the court should make express findings of fact and conclusions of law as to the statutory basis for the fee award. *Panhandle Fire Prot., Inc. v. Batson Cook Co.*, 288 Ga. App. 194, 653 S.E.2d 802 (2007).

Since the trial court lacked jurisdiction to decide a lessee's motion for clarification as an out-of-term motion to reconsider the original order and such was insufficient to extend the time to file timely a notice of appeal as to such order, the appeals court lacked jurisdiction to consider the appeal; thus, the trial court's clarification order declaring the court's original order granting summary judgment to the lessee on the lessee's specific performance claim, but denying the lessee's breach of contract and attorney-fee claim, and denying the lessor's motion for partial summary judgment on the lessor's claim for reasonable rents was vacated. *Masters v. Clark*, 269 Ga. App. 537, 604 S.E.2d 556 (2004), appeal dismissed, *Clark v. Masters*, 297 Ga. App. 794, 678 S.E.2d 538 (2009).

Denial of a wife's alleged claim for attorney fees in a divorce action was upheld on appeal when the wife's sole request for attorney fees came within a motion for contempt the wife filed against the husband and strict compliance with O.C.G.A. § 9-15-14(e) required a claim for attorney

fees to be made by motion. *Jackson v. Jackson*, 282 Ga. 459, 651 S.E.2d 92 (2007).

**Timing of request for attorney fees.** — When a trial court grants judgment for a defendant on one count of a multi-count complaint and expressly directs entry of a final judgment under O.C.G.A. § 9-11-54(b), the defendant must move for attorney's fees relating to that claim within 45 days of the judgment. *Little v. GMC*, 229 Ga. App. 781, 495 S.E.2d 572 (1998).

Voluntary dismissal without prejudice was not a "final termination" of the case and so the 45-day "window of opportunity" for moving for penalties and attorney's fees pursuant to O.C.G.A. § 9-15-14 did not begin to run with the plaintiff's voluntary dismissal of the plaintiff's complaint without prejudice and the plaintiff's motion for penalties and attorney's fees was timely; however, the award of attorney's fees was vacated and the case was remanded since the trial court's judgment contained no findings of conduct that authorized the award. *Meister v. Brock*, 268 Ga. App. 849, 602 S.E.2d 867 (2004).

As real property contestants failed to file a request for attorney fees pursuant to O.C.G.A. § 9-15-14 within 45 days following a trial court's final disposition in a real property proceeding, the trial court erred in granting the contestants' request because the court lacked jurisdiction to consider the motion; the time for filing the motion began to run when judgment was entered under O.C.G.A. § 5-6-31, and the time when a civil disposition form was filed under O.C.G.A. § 9-11-58(b) had no effect on the timing for purposes of the motion. *Horesh v. DeKinder*, 295 Ga. App. 826, 673 S.E.2d 311 (2009).

**Request for attorney's fees proper.** — Party properly moved for an award of attorney's fees under O.C.G.A. § 9-15-14 since the party had not induced the plaintiffs' dismissal of the complaint against the party which was entered incidental to a settlement of the underlying dispute between the plaintiffs and the party's co-defendant, and the party's dismissal of the counterclaim without prejudice did not affect the party's rights under that section since the dismissal was not a condition of



**Procedure (Cont'd)**

the plaintiffs' dismissal with prejudice of the plaintiff's claim against the party. *Forest Lakes Home Owners Ass'n v. Green Indus., Inc.*, 218 Ga. App. 890, 463 S.E.2d 723 (1995).

Trial court did not err in granting attorney's fees under O.C.G.A. § 9-15-14(a) since the defendant co-tenant could not defeat partition on the ground that the co-tenant seeking partition acquired an interest illegally from a third person who was not a party to the case. *Reece v. Smith*, 276 Ga. 404, 577 S.E.2d 583 (2003).

**Section pertains only to actions brought in state courts.** — O.C.G.A. § 9-15-14 only pertains to actions brought "in any court of record of this state." *Union Carbide Corp. v. Tarancon Corp.*, 682 F. Supp. 535 (N.D. Ga. 1988).

Abusive litigation counterclaim under *Yost v. Torok*, 256 Ga. 92, 344 S.E.2d 414 (1986), like a claim brought under O.C.G.A. § 9-15-14, may not be brought in federal court but, rather, must be limited to actions brought in the state courts of Georgia. *Union Carbide Corp. v. Tarancon Corp.*, 682 F. Supp. 535 (N.D. Ga. 1988).

Given the preference under Georgia law for jury resolution of a claim for fees under O.C.G.A. § 13-6-11, and the open question of whether a jury would award damages to the plaintiff on the plaintiff's breach of contract claim, the defendants' motion for summary judgment on the plaintiff's claim for fees was denied. However, summary judgment was granted in favor of the defendants on the plaintiff's claim for fees under O.C.G.A. § 9-15-14 as that provision was not available to civil litigants in federal court. *Jackson v. JHD Dental, LLC*, No. 1:10-CV-00173-JEC, 2011 U.S. Dist. LEXIS 63015 (N.D. Ga. June 14, 2011).

**Strategic lawsuits against public participation.** — There is no requirement that a party first seek to invoke O.C.G.A. § 9-15-14 or O.C.G.A. § 51-7-80 before seeking the protections of O.C.G.A. § 9-11-11.1. *Hagemann v. City of Marietta*, 287 Ga. App. 1, 650 S.E.2d 363 (2007), cert. denied, 2008 Ga. LEXIS 128 (Ga. 2008).

**Necessary evidence demonstrating fee.** — Trial court did not err in granting attorney's fees under subsection (b) of O.C.G.A. § 9-15-14 upon finding that the plaintiff unnecessarily expanded the proceedings by improper conduct; however, ordering an award without conducting a hearing and without important evidence, such as billing records, constituted an abuse of discretion. *Hallman v. Emory Univ.*, 225 Ga. App. 247, 483 S.E.2d 362 (1997).

Attorney fee awarded under O.C.G.A. § 9-15-14 was vacated and the case was remanded as the trial court was ordered to sufficiently determine whether additional facts adduced after the denial of the prevailing party's motion for summary judgment authorized the attorney's fee award. *Johnston v. Correale*, 285 Ga. App. 870, 648 S.E.2d 180 (2007).

In a child custody matter, a trial court erred in awarding a mother attorney's fees as sanctions under O.C.G.A. § 9-15-14(b) by failing to make findings sufficient to support such an award. *Longe v. Fleming*, 318 Ga. App. 258, 733 S.E.2d 792 (2012).

In a child visitation dispute, the trial court did not abuse the court's discretion in awarding a father attorney's fees under O.C.G.A. § 9-15-14 because the mother used a motion for contempt to unnecessarily expand what was otherwise an honest disagreement over an ambiguity in the custody order as to which airports could be used to exchange the child after visitation; however, the trial court did err in awarding the amount of \$2,832.50 based solely on unsupported assertions made in the briefs. *Bankston v. Warbington*, 319 Ga. App. 821, 738 S.E.2d 656 (2013).

**Findings by court must support award.** — Trial court's order did not contain findings sufficient to award attorney's fees; thus, the portion of the trial court's order awarding attorney's fees in the contempt action the tenant filed against the landlord had to be vacated and the case had to be remanded to determine if an appropriate award could be made. *H. J. Russell & Co. v. Manuel*, 264 Ga. App. 273, 590 S.E.2d 250 (2003).

Trial court may assess attorney's fees upon the court's own motion but when the court does so under O.C.G.A. § 9-15-14, it



is incumbent upon the trial court to specify the conduct upon which the award is made; when a judgment for attorney fees was devoid of such findings, the judgment was vacated and the case was remanded for reconsideration. *Mize v. Regions Bank*, 265 Ga. App. 635, 595 S.E.2d 324 (2004).

Trial court erred in awarding attorney fees under O.C.G.A. § 9-15-14 without making any findings in support of the award. *Robinson v. Williams*, 280 Ga. 877, 635 S.E.2d 120 (2006).

Because the trial court failed to make findings sufficient to support an attorney's fee award under either O.C.G.A. § 19-6-2 or O.C.G.A. § 9-15-14(b), this issue had to be remanded for an explanation of the statutory basis for the award and any findings necessary to support the award. *Cason v. Cason*, 281 Ga. 296, 637 S.E.2d 716 (2006).

Trial court's orders concerning an award under O.C.G.A. § 9-15-14(a) or (b) did not contain the findings necessary to support such an award; neither the original application or the trial court's orders on the subjects mentioned the statute and the trial court concluded only that a motion was filed without justification, that a hearing confirmed its lack of merit, and that an award would fairly compensate the nonmoving party. *Interfinancial Midtown, Inc. v. Choate Constr. Co.*, 284 Ga. App. 747, 644 S.E.2d 281 (2007).

In a divorce case, an award of attorney fees to the wife had to be reversed because the trial court had not specified whether the court was awarding fees under O.C.G.A. § 19-6-2 or O.C.G.A. § 9-15-14 and had not made any findings in support of the court's award. *Leggette v. Leggette*, 284 Ga. 432, 668 S.E.2d 251 (2008).

Trial court stated that the court was awarding attorney fees and expenses under O.C.G.A. § 9-15-14 against an intervenor in a bond validation proceeding because the intervention was brought for an improper purpose, to extort money from developers. However, the trial court failed to make findings supporting the court's award, requiring remand. *Citizens for Ethics in Gov't, LLC v. Atlanta Dev. Auth.*, 303 Ga. App. 724, 694 S.E.2d 680 (2010), cert. denied, No. S10C1350, 2010 Ga. LEXIS 722 (Ga. 2010).

Award of attorney's fees to a party in a partition action was not authorized under O.C.G.A. § 9-15-14 because the trial court did not make any findings of conduct authorizing an award under that section as required. *O'Connor v. Bielski*, 288 Ga. 81, 701 S.E.2d 856 (2010).

Trial court erred in awarding a husband attorney fees because the court merely ordered the wife to pay attorney fees to the husband without findings of fact and without any cogent evidence of the work performed by the husband's counsel and the nature thereof. *Holloway v. Holloway*, 288 Ga. 147, 702 S.E.2d 132 (2010).

Trial court did not abuse the court's discretion by awarding attorney fees under O.C.G.A. § 9-14-15(b), but the trial court's order failed to show how the court apportioned the award to fees generated based solely on the employee's sanctionable behavior. Remand was required for fact finding on this issue. *Trotman v. Velociteach Project Mgmt., LLC*, 311 Ga. App. 208, 715 S.E.2d 449 (2011), cert. denied, No. S11C1920, 2012 Ga. LEXIS 66 (Ga. 2012).

Trial court erred in awarding the unit owners attorney fees and costs under O.C.G.A. § 9-15-14 as the trial court did not make findings of fact or findings as to conduct authorizing the award. *Dan J. Sheehan Co. v. Fairlawn on Jones Homeowners Ass'n*, 312 Ga. App. 787, 720 S.E.2d 259 (2011).

Trial court's order failed to make express findings of fact or conclusions of law as to the statutory basis for the court's award of attorney fees to the owner's counsel, and the trial court's order failed to even specify whether the attorney fees were awarded under O.C.G.A. § 9-15-14 at all, much less which subsection of the statute supports the award. As a result, the award of attorney fees was vacated, and the matter was remanded to the trial court for reconsideration of the grant of attorney fees and for the trial court to make express findings of fact and conclusions of law as to the statutory basis for any such award and the conduct which authorized the award. *Woods v. Hall*, 315 Ga. App. 93, 726 S.E.2d 596 (2012).

Trial court did not abuse the court's discretion by awarding fees under



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O.C.G.A. § 9-15-14 to the defendant based on the frivolous nature of the plaintiff's lawsuit but because the order did not indicate how the trial court apportioned the court's award to fees generated based on the plaintiff's sanctionable conduct, a remand was required. *Fedina v. Larichev*, 322 Ga. App. 76, 744 S.E.2d 72 (2013).

Trial court erred in failing to specify the statutory grounds upon which the court awarded attorney fees or to make findings of fact specifying the conduct upon which the award was based. *Ware v. Am. Recovery Solution Servs.*, 324 Ga. App. 187, 749 S.E.2d 775 (2013).

Order awarding attorney fees was vacated because the trial court had to reconsider whether the law firm engaged in sanctionable conduct, whether the client's action lacked substantial justification, whether attorney's fees should be awarded under O.C.G.A. § 9-15-14, and for appropriate fact-finding as to the amount, if any, to be assessed. *Gibson Law Firm, LLC v. Miller Built Homes, Inc.*, 327 Ga. App. 688, 761 S.E.2d 95 (2014).

**Failure to specify subsection award was based on was not fatal.** — While the trial court's order failed to specify which subsection of O.C.G.A. § 9-15-14 the court's order of attorney fees was made, that error was not fatal as the trial court's findings substantially tracked § 9-15-14(a). *Williams v. Warren*, 322 Ga. App. 599, 745 S.E.2d 809 (2013).

**Statute not focused on pre-litigation activities.** — Focus of subsections (a) and (b) of O.C.G.A. § 9-15-14 is upon the actions that may be undertaken in connection with the underlying legal proceedings and not upon any pre-litigation actions of one who eventually becomes a party to a civil action. *Cobb County v. Sevani*, 196 Ga. App. 247, 395 S.E.2d 572, cert. denied, 196 Ga. App. 907, 395 S.E.2d 572 (1990).

Superior court erred in relying upon a condemnor's pre-acquisition activities as authorizing an award of attorney's fees to the condemnee since the condemnor's legal right to condemn the condemnee's property was never challenged in the superior court and the factual issue of "just

and adequate compensation" was resolved by the jury, and not by the superior court. *Cobb County v. Sevani*, 196 Ga. App. 247, 395 S.E.2d 572, cert. denied, 196 Ga. App. 907, 395 S.E.2d 572 (1990).

**Motion filed after verdict but before entry of judgment.** — Motion for litigation costs and attorney's fees filed the day after the jury returned the jury's verdict, but before the entry of judgment, was not filed 45 days "after the final disposition of the action" as required by subsection (e) of O.C.G.A. § 9-15-14 and the trial court was without jurisdiction to consider the motion. *Marshall v. Ricmar, Inc.*, 215 Ga. App. 470, 451 S.E.2d 515 (1994).

**Forty-five days to move for imposition of attorney's fees.** — Court rejected an appellant's argument that the trial court lacked jurisdiction to render an attorney fee award after the appellant voluntarily dismissed the appellant's lawsuit. O.C.G.A. § 9-15-14(e) authorized a party to move for attorney fees up to 45 days after the final disposition of the action. *Hart v. Redmond Reg'l Med. Ctr.*, 300 Ga. App. 641, 686 S.E.2d 130 (2009).

**Request must be at end of legal proceedings.** — Since a motion under O.C.G.A. § 9-15-14 for attorney's fees is the prevailing party's final request in a concluded legal proceeding, a request for attorney's fees contained in a party's initial pleading whereby a legal proceeding is commenced, such as a motion by contempt for violating a custody order, obviously does not qualify. *In re M.A.K.*, 202 Ga. App. 342, 414 S.E.2d 288 (1991).

**Post-verdict oral request converted request for fees in counterclaim to motion.** — In a civil suit involving the title of real property, a trial court erred by denying the prevailing parties' oral post-verdict request for an award of attorney fees under O.C.G.A. § 9-15-14(a) as such oral request converted the original request made in a counterclaim to a motion and the opposing party had the opportunity to be heard and argue against the award. *Nesbit v. Nesbit*, 295 Ga. App. 763, 673 S.E.2d 272 (2009).

**Liability for fees following withdrawal.** — Attorneys could not be liable for fees incurred in post-judgment collec-



tion as the attorneys had withdrawn long before that phase of the litigation. *Harkleroad v. Stringer*, 231 Ga. App. 464, 499 S.E.2d 379 (1998).

**Notice required.** — Proceeding to impose attorney's fees, like any other judicial proceeding, requires proper notice. *Green v. Sheppard*, 173 Bankr. 799 (Bankr. N.D. Ga. 1994).

**Hearing required.** — Party opposing a claim for attorney's fees has a basic right to confront and challenge testimony as to the value and need for services; thus, when an attorney who was ordered to pay attorney's fees was not afforded such an opportunity, the judgment was reversed and remanded for an evidentiary hearing. *C.A. Gaslowitz & Assocs. v. ZML Promenade*, 230 Ga. App. 405, 496 S.E.2d 470 (1998); *Rowan v. Reuss*, 246 Ga. App. 139, 539 S.E.2d 241 (2000); *Green v. McCart*, 273 Ga. 862, 548 S.E.2d 303 (2001).

Remand was required when the trial court awarded a defendant attorney fees under O.C.G.A. § 9-15-14 without a hearing. The trial court's finding that the lawsuit lacked substantial justification was insufficient to support the award; moreover, a hearing was required to enter an award of attorney fees. *Note Purchase Co. of Ga., LLC v. Brenda Lee Strickland Realty, Inc.*, 288 Ga. App. 594, 654 S.E.2d 393 (2007).

When the plaintiff, in the plaintiff's response to the defendant's motion for attorney's fees, specifically objected to the assertions of defendant's counsel regarding defense counsel's calculation of fees, the plaintiff's timely objection was sufficient to preclude a waiver by conduct of the right to an evidentiary hearing, and the trial court erred in entering judgment for the defendants as to the fees without providing the plaintiff an opportunity to confront and challenge the evidence. *Munoz v. American Lawyer Media*, 236 Ga. App. 462, 512 S.E.2d 347 (1999).

Trial court lacked the power or authority under subsections (d) and (f) of O.C.G.A. § 9-15-14 to make an award without a hearing and evidence as to what reasonable attorney's fees were directly caused by the defendant's improper conduct. *Herringdine v. Nalley Equip. Leasing, Ltd.*, 238 Ga. App. 210, 517 S.E.2d 571 (1999).

Appellant contended that the trial court erred by granting the appellee's motion for attorney's fees under O.C.G.A. § 9-15-14 without conducting a hearing. Although there was no abuse of discretion in the award of attorney's fees, because the appellant persisted in pursuing this action while knowing that the appellant had not obtained personal service on the appellees (see *Haggard v. Bd. of Regents &c. of Ga.*, 257 Ga. 524, 527, 360 S.E.2d 566 (1987)), a hearing was required under O.C.G.A. § 9-15-14 on the amount of the award. *Sawyer v. Sawyer*, 253 Ga. App. 619, 560 S.E.2d 86 (2002).

Award of attorney's fees in a contract case was vacated since the trial court neither conducted a hearing nor included in the order any findings of fact supporting the award; since at least part of the suit may have lacked justification based on a bankruptcy court's determination that the contract sued on was unenforceable, a reversal of the award was unwarranted. *MacDonald v. Harris*, 266 Ga. App. 287, 597 S.E.2d 125 (2004).

Award of attorney fees under O.C.G.A. § 9-15-14(b) was reversible error because no hearing had been held. *Slone v. Myers*, 288 Ga. App. 8, 653 S.E.2d 323 (2007), cert. denied, 555 U.S. 881, 129 S. Ct. 196, 172 L.Ed.2d 140 (2008).

Trial court's assessment of attorney's fees against an attorney who represented a client in an action against a magistrate judge for alleged violations of the client's civil rights was improper because the trial court failed to provide the attorney with notice that the trial court was contemplating the award of attorney fees and did not afford the attorney a hearing where the attorney could challenge the basis upon which the attorney fees were awarded. *Wall v. Thurman*, 283 Ga. 533, 661 S.E.2d 549 (2008).

Because O.C.G.A. § 9-11-68 did not apply as the statute became effective during the pendency of the litigation, because the trial court failed to include specific findings of fact to support an award of attorney's fees and costs of litigation under O.C.G.A. § 9-15-14, and because neither the first driver nor the first driver's attorney were afforded an opportunity to be heard before sanctions were imposed, the



**Procedure** (Cont'd)

trial court erred in awarding the second driver attorney's fees and costs of litigation. *Olarsch v. Newell*, 295 Ga. App. 210, 671 S.E.2d 253 (2008).

Trial court erred in awarding a county water authority attorney fees pursuant to O.C.G.A. § 9-15-14 because the trial court failed to hold a required hearing on the motion for attorney fees, to identify the statutory basis under either § 9-15-14(a) or (b) for the award, and to include the requisite findings of conduct that authorize the award. *Meacham v. Franklin-Heard County Water Auth.*, 302 Ga. App. 69, 690 S.E.2d 186 (2009), cert. denied, No. S10C0865, 2010 Ga. LEXIS 427 (Ga. 2010).

Trial court erred in awarding a debtor attorney's fees and expenses under O.C.G.A. § 9-15-14 without holding a hearing on the debtor's motion, allowing the creditor 30 days in which to file a response as required under Ga. Unif. Super. Ct. R. 6.2, and in failing to make findings of fact or explain the statutory basis for the court's award of fees. *Unifund CCR Partners v. Mehrlander*, 309 Ga. App. 685, 710 S.E.2d 882 (2011).

In a child support modification case, an award of \$25,000 attorney fees to the mother under O.C.G.A. § 9-15-14 was improper because the trial court failed to hold an evidentiary hearing and to make the findings required for an award under that statute; if the mother also failed to respond to discovery, an award in the father's favor was proper. *Williams v. Becker*, 294 Ga. 411, 754 S.E.2d 11 (2014).

**Refusal to permit expert testimony reversible error.** — Since the trial court refused to permit expert testimony that would have corroborated an attorney's belief that the attorney's client was insolvent and unbondable, thereby negating a finding of bad faith, this exclusion of evidence critical to the defense was reversible error. *Northen v. Mary Anne Frolick & Assocs.*, 236 Ga. App. 7, 510 S.E.2d 857 (1999).

**Affidavits in opposition.** — When affidavits submitted by the plaintiff in opposition to a motion for attorney's fees contained no citation to legal authority, but

merely expressed opinions and legal conclusions regarding the lack of frivolity of the plaintiff's complaint, the affidavits were immaterial. *Munoz v. American Lawyer Media*, 236 Ga. App. 462, 512 S.E.2d 347 (1999).

**Affidavits offered in support of motion.** — Decision to consider a late-filed affidavit offered in support of a motion for attorney fees under O.C.G.A. § 9-15-14 lies within the sound discretion of the trial court. It does not render the motion void ab initio. *Note Purchase Co. of Ga., LLC v. Brenda Lee Strickland Realty, Inc.*, 288 Ga. App. 594, 654 S.E.2d 393 (2007).

**Time limitations.** — An award of attorney's fees under O.C.G.A. § 9-15-14 that was not completed within the time limitations of O.C.G.A. § 34-9-105(b) was a nullity, since, once the time limitation had run, the court was without subject matter jurisdiction. *Taylor Timber Co. v. Baker*, 226 Ga. App. 211, 485 S.E.2d 819 (1997); *Brassfield & Gorrie v. Ogletree*, 241 Ga. App. 56, 526 S.E.2d 103 (1999).

Defendant's motion for attorney's fees and expenses was untimely since the motion was not filed until 421 days after final judgment, notwithstanding that the motion was filed within 45 days of the denial of certiorari by the Supreme Court, since an appeal does not extend the time for such a motion. *Hewitt v. Walker*, 234 Ga. App. 78, 506 S.E.2d 215 (1998).

**Litigation expenses and attorney's fees cannot be awarded until claimant has prevailed** on the claimant's underlying abusive litigation claim. *Williams v. Clark-Atlanta Univ., Inc.*, 200 Ga. App. 51, 406 S.E.2d 559 (1991).

Claim for abusive litigation and attorney's fees could not be maintained until underlying litigation had concluded. *McCullough v. McCullough*, 263 Ga. 794, 439 S.E.2d 486 (1994).

**"Final disposition of the action,"** as used in subsection (e) of O.C.G.A. § 9-15-14, means the entry of the final judgment, not the final decision in the case on appeal. *Fairburn Banking Co. v. Gafford*, 263 Ga. 792, 439 S.E.2d 482 (1994).

The 45-day period for filing a motion for sanctions commenced with entry of the dismissal of an action, which was a final



judgment under O.C.G.A. § 5-6-34, and a motion to set aside did not extend that deadline. *Gist v. DeKalb Tire Co.*, 223 Ga. App. 397, 477 S.E.2d 616 (1996).

**Attorney's fees not waived by failure to include in pretrial order.** — Defendant did not waive the issue of attorney's fees by failing to include the issue in the parties' pretrial order under O.C.G.A. § 9-11-16, because a motion for attorney's fees under O.C.G.A. § 9-15-14 could be, according to the language of the statute, made at any time during the action but not later than 45 days after judgment. *McClure v. McCurry*, 329 Ga. App. 342, 765 S.E.2d 30 (2014).

**Request for fees was to be by motion, not as a counterclaim.** — Superior court correctly held that a claim for attorney's fees and litigation costs under O.C.G.A. § 9-15-14 must be made by motion, not by answer or counterclaim. *Langley v. Nat'l Labor Group, Inc.*, 262 Ga. App. 749, 586 S.E.2d 418 (2003).

Request for attorney fees set forth in a counterclaim pleading was not properly construed as an O.C.G.A. § 9-15-14 motion because a trial court could not entertain a § 9-15-14 request asserted only in the form of a counterclaim. *Hagemann v. City of Marietta*, 287 Ga. App. 1, 650 S.E.2d 363 (2007), cert. denied, 2008 Ga. LEXIS 128 (Ga. 2008).

**Trial court's order must include findings of conduct that authorize award** under O.C.G.A. § 9-15-14, or the order must be vacated. *Porter v. Felker*, 261 Ga. 421, 405 S.E.2d 31 (1991); *Bill Parker & Assocs. v. Rahr*, 216 Ga. App. 838, 456 S.E.2d 221 (1995); *Katz v. Harris*, 217 Ga. App. 287, 457 S.E.2d 239 (1995); *Aycock v. RE/MAX of Ga., Inc.*, 221 Ga. App. 587, 472 S.E.2d 137 (1996); *Morris v. Morris*, 222 Ga. App. 617, 475 S.E.2d 676 (1996); *Shimshi v. A.G. Spanos Dev., Inc.*, 228 Ga. App. 669, 492 S.E.2d 531 (1997); *Newman v. Filsoof*, 224 Ga. App. 461, 481 S.E.2d 4 (1997); *Nuckols v. Nuckols*, 226 Ga. App. 194, 486 S.E.2d 194 (1997); *City of Cumming v. Realty Dev. Corp.*, 268 Ga. 461, 491 S.E.2d 60 (1997); *Boomershine Pontiac-GMC Truck, Inc. v. Snapp*, 232 Ga. App. 850, 503 S.E.2d 90 (1998); *La Petite Academy, Inc. v. Prescott*, 234 Ga. App. 32, 506 S.E.2d 183 (1998).

When a judgment awards legal fees or expenses of litigation under O.C.G.A. § 9-15-14, but contains no findings by the trial court or conduct that would authorize the award, that portion of the judgment must be vacated. *Wyatt v. Hertz Claim Mgt. Corp.*, 236 Ga. App. 292, 511 S.E.2d 630 (1999).

Attorney fees award against purchasers under O.C.G.A. § 9-15-14 was not supported by sufficient findings in a proceSSIONING action; further, the trial court did not distinguish which part of the attorney fees were spent successfully challenging the western boundary line as set by the proceSSIONERS, and a justiciable issue as to other boundaries was not completely absent. *Hall v. Christian Church of Ga., Inc.*, 280 Ga. App. 721, 634 S.E.2d 793 (2006).

In a divorce action, wherein the trial court incorporated a mediation settlement agreement entered into by the parties, the trial court erred by awarding one party attorney fees and by awarding witness fees to the mediator without explaining the statutory basis for the award and any findings necessary to support the award. *Wilson v. Wilson*, 282 Ga. 728, 653 S.E.2d 702 (2007).

Reconsideration of an attorney fee award was required because the trial court's order failed to specify under which subsection the award was made and the specific conduct upon which the award was based, and because the evidence as to the actual costs and reasonableness of those costs was lacking. *Reynolds v. Clark*, 322 Ga. App. 788, 746 S.E.2d 266 (2013).

State court erred in awarding attorney fees without making express findings of fact or conclusions of law as to the statutory basis for the court's award of attorney fees to the sellers. The court's order failed to even specify whether the attorney fees were awarded under O.C.G.A. § 9-15-14 at all, much less which subsection supported the award. *Kinsala v. Hair*, 324 Ga. App. 1, 747 S.E.2d 887 (2013).

Order awarding attorney fees failed to contain the factual findings that underlay the trial court's conclusions that the plaintiff's action lacked substantial justification and was baseless and frivolous; further, the trial court did not specify



**Procedure (Cont'd)**

whether either award was made pursuant to O.C.G.A. § 9-15-14(a) or (b); therefore, remand was required. *McClure v. McCurry*, 329 Ga. App. 342, 765 S.E.2d 30 (2014).

**State court denial of award binding on bankruptcy court.** — Creditor's motion to amend the creditor's claim for sanctions against the debtor under O.C.G.A. § 9-15-14 to state a claim under O.C.G.A. § 51-7-81 was denied as the amendment was untimely and inequitable, being filed two years after the debtor had been granted a discharge and the time for filing claims had long since passed. *In re Fowler*, No. 03-92256-MGD, 2006 Bankr. LEXIS 2322 (Bankr. N.D. Ga. July 10, 2006).

Bankruptcy court dismissed a partnership's claim seeking an award of attorneys' fees under O.C.G.A. § 9-15-14 because the partnership failed to allege facts which showed that an award of fees was warranted under § 9-15-14. The partnership's claim that a bank was "stubbornly litigious" and caused the partnership "unnecessary trouble and expense" was not supported by specific facts and was insufficient to support a claim for relief under § 9-15-14. *SLW Partners, LP v. State Bank & Trust Co. (In re SLW Partners, LP)*, No. 11-5291, 2012 Bankr. LEXIS 5065 (Bankr. N.D. Ga. Sept. 28, 2012).

**Application**

**Juvenile court had no authority to impose attorney fees.** — Juvenile court properly concluded that the court had no authority to impose attorney fees under the Civil Practice Act, O.C.G.A. § 9-11-1 et seq., because the juvenile court had not adopted O.C.G.A. § 9-15-14, and there was no implicit attorney fee award for frivolous litigation in the former Juvenile Court Code; the Civil Practice Act does not apply to juvenile courts. *In re T.M.M.L.*, 313 Ga. App. 638, 722 S.E.2d 386 (2012).

**Attorney's fees denied.** — Taxpayer's request for attorney's fees was denied since there was no evidence that the County Board of Tax Assessors lacked substantial justification in asserting the Board's interpretation of the statute.

*Fulton County Bd. of Tax Assessors v. Boyajian*, 271 Ga. 881, 525 S.E.2d 687 (2000).

Court did not abuse the court's discretion in denying either the husband's request for attorney's fees incurred by him in defending a child custody modification action or the wife's similar request for attorney's fees incurred by her as a result of the parties' inability to reach a settlement since the court granted essential relief requested by the wife in her complaint and granted the husband relief to which the wife had not agreed. *Glaza v. Morgan*, 248 Ga. App. 623, 548 S.E.2d 389 (2001).

Trial court did not err in denying the wife's motion for attorney's fees regarding the owner's damages action against the wife's husband; while the owner failed to appear for trial after the wife and the husband were forced to expend time and resources preparing a defense to the lawsuit, the wife failed to establish that the owner's claim lacked any justiciable issue of law or fact. *Bellah v. Peterson*, 259 Ga. App. 182, 576 S.E.2d 585 (2003).

Defendants sought an award of attorneys' fees after summary judgment was granted to the defendants on the breach of contract claims and promissory estoppel claims, and the jury found in defendants' favor as to the fraud claim, but the court properly denied an award of attorneys' fees because the plaintiffs' claim had some factual merit or presented a justiciable issue of law. *Rental Equip. Group, LLC v. Maci, LLC*, 263 Ga. App. 155, 587 S.E.2d 364 (2003).

Because the main case was before the Court of Appeals of Georgia on direct appeal under O.C.G.A. § 5-6-35(j), the court granted an attorney's application for discretionary appeal of the denial by the trial court of the attorney's motion for attorney's fees pursuant to O.C.G.A. § 9-15-14(a) and (b). After considering the record under the appropriate standards as to each subsection, the trial court did not abuse the court's discretion and the evidence supported the court's denial of the motion. *Kilgore v. Sheetz*, 268 Ga. App. 761, 603 S.E.2d 24 (2004).

Trial court properly rejected the hospital's claim for additional attorney fees



under O.C.G.A. § 9-15-14(a) because the jury could have determined that a doctor simply did not remember signing a contract; the doctor's lack of memory did not preclude a question of fact in the case. *Whitaker v. Houston County Hosp. Auth.*, 272 Ga. App. 870, 613 S.E.2d 664 (2005).

Claim by a plaintiff, who had unsuccessfully asserted in a claim for attorney fees and costs under O.C.G.A. § 9-15-14 that the peer review privilege under O.C.G.A. § 31-7-133(a) was improperly applied, that asserted the same claim against the same parties in an abusive litigation action under O.C.G.A. § 51-7-80 et seq., was barred by collateral estoppel. *Freeman v. Wheeler*, 277 Ga. App. 753, 627 S.E.2d 86 (2006).

In a negligence suit wherein a train patron was attacked and raped while exiting a train station, and the defending public transportation authority was found to have intentionally made a false response regarding the creation and maintenance of certain documents, the trial court did not abuse the court's discretion by denying the train patron's motion for attorney fees, pursuant to O.C.G.A. § 9-15-14(b), as it was entirely within the discretion of the trial court after considering all the facts and law and there was evidence that the authority's conduct did not expand the proceeding since the documents were destroyed before the discovery was propounded. *MARTA v. Doe*, 292 Ga. App. 532, 664 S.E.2d 893 (2008).

Property owners alleged a water supply company acted in bad faith, was stubbornly litigious, and caused the owners unnecessary trouble and expense. As litigation between the parties was lengthy and acrimonious; each side accused the other of numerous bad acts; and the trial court considered numerous motions and pleadings and held more than three hearings, the court did not abuse the court's discretion in failing to award fees to the owners on the owners' own motion pursuant to O.C.G.A. § 9-15-14(b). *Stewart v. Tricord, LLC*, 296 Ga. App. 834, 676 S.E.2d 229 (2009).

There was some evidence from which a jury was authorized to find wrongful eviction including a homeowner's filing of a dispossessory action against the tenant,

although the jury ultimately concluded that the tenant was not a tenant but a house guest of the homeowner. Therefore, the trial court did not abuse the court's discretion in denying the defendant an award of attorney fees under O.C.G.A. § 9-15-14(b). *Rescigno v. Vesali*, 306 Ga. App. 610, 703 S.E.2d 65 (2010).

Trial court did not abuse the court's discretion when the court declined to award the builders fees under O.C.G.A. § 9-15-14 because the trial court did not find that the property owners' allegations were without substantial justification warranting an award under § 9-15-14; in partially denying the builders' motion for summary judgment, the trial court found that there were genuine issues of fact for trial, and in the court's order denying fees, the court also stated that there were no facts revealed at trial that would have changed the court's decision on summary judgment. *O'Leary v. Whitehall Constr.*, 288 Ga. 790, 708 S.E.2d 353 (2011).

Trial court did not abuse the court's discretion in denying a motion for attorney fees filed by a homeowners' association because the proceedings were hard fought, and the feelings of the parties were intense. *Campbell v. Landings Ass'n*, 311 Ga. App. 476, 716 S.E.2d 543 (2011).

**Attorney's fees improperly denied.** — Trial court erred in denying a shooting club's motion for attorney's fees under O.C.G.A. § 9-15-14(a) or (b) after the club successfully obtained a writ of mandamus requiring the county to reissue the club's building permit since: (1) there was testimony at the appeal to the board of commissioners that the building permit was legal when the permit was issued; (2) at the hearing on the motion for attorney's fees, there was testimony that the chair of the board of commissioners told a witness that "the County Commission really would prefer to make the courts the bad guys rather than themselves"; (3) the club introduced deposition testimony in which the county commissioners could not articulate a legally cognizable reason to justify their revocation of the building permit; (4) the county did not put up any evidence and called no witnesses to testify at either the hearing on the petition for mandamus or the hearing on the request for attor-



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ney's fees; and (5) the trial court clearly found no justiciable issue of law or fact that supported the county's position. *Southland Outdoors, Inc. v. Putnam County*, 265 Ga. App. 399, 593 S.E.2d 940 (2004).

Trial court erred when the court denied the company president's motion for attorney fees on the basis that the employee's fraudulent inducement claim presented no justiciable issue of law or fact as the employee failed to present any evidence showing that the claim for fraudulent inducement had any merit because the employee's own testimony contradicted the position taken in that claim. *Omni Builders Risk v. Bennett*, 2013 Ga. App. LEXIS 966 (Nov. 21, 2013).

**Award of fees was improper.** — Trial court erred in awarding attorney's fees to inmates who had filed an action against a county due to inadequate medical care in the county jail, pursuant to O.C.G.A. § 9-15-14(b), since there was no finding that the county's arguments lacked substantial justification, there was no finding that the issues asserted by the county were baseless, and there was no right to attorney's fees merely because the county appealed the ruling. *DeKalb County v. Adams*, 263 Ga. App. 201, 587 S.E.2d 302 (2003).

In an administratrix's action against a stepfather's estate to set aside a deed that the administratrix's mother conveyed to the stepfather, a court erred in awarding attorney's fees to the estate pursuant to O.C.G.A. § 9-15-14(b) because there was no evidence that, in bringing suit, the administratrix's unnecessarily expanded the proceedings, harassed the estate, or otherwise engaged in improper conduct. *Doster v. Bates*, 266 Ga. App. 194, 596 S.E.2d 699 (2004).

Award of attorney fees to ex-husband was reversed as attorney fees were not authorized in an action seeking a change of custody by the noncustodial parent, even if child support was also sought; there was nothing in the record to suggest that the attorney fees were awarded under O.C.G.A. § 9-15-14 as the trial court did not rule on the ex-husband's motion

seeking an amendment to the order to include reference to § 9-15-14 and seeking findings of fact to support the order. *Thornton v. Intveldt*, 272 Ga. App. 906, 614 S.E.2d 175 (2005).

Trial court erred by granting a husband's motion for attorney fees pursuant to O.C.G.A. § 9-15-14 without holding a hearing; further, it was illogical for the trial court to hold that the wife's motion for a new trial was frivolous while simultaneously granting the wife's motion for reconsideration of the final order posing similar arguments. *Fox-Korucu v. Korucu*, 279 Ga. 769, 621 S.E.2d 460 (2005).

Trial court committed reversible error by not apportioning a welder's attorney fees between those incurred in defending against the frivolous claims and those fees incurred in defending against the non-frivolous claims before entering an attorney fees award. *Trotter v. Summerour*, 273 Ga. App. 263, 614 S.E.2d 887 (2005).

Insured was not entitled to recover attorney's fees or the expenses of litigation from an insurance company because the insured's complaint for breach of contract, tortious interference with a contract, and punitive damages failed to state any underlying claim under which relief could have been granted the insured. *Perry v. Unum Life Ins. Co. of Am.*, 353 F. Supp. 2d 1237 (N.D. Ga. 2005).

Trial court erred in failing to consider an award of attorney fees under O.C.G.A. § 9-15-14(b) to the apartment complex owners in an action by a tenant, alleging that the owners were negligent in not repairing a window pane which allowed an intruder to enter and to commit the criminal acts against the tenant as the trial court had expressly found that there was no evidence that the owners' attorneys had participated in spoliation of a rape kit; accordingly, the trial court's denial as premature of the owners' motion for fees upon the tenant's request for spoliation sanctions was error. *Bouve & Mohr, LLC v. Banks*, 274 Ga. App. 758, 618 S.E.2d 650 (2005).

Award of attorney fees to the estate, if predicated on O.C.G.A. § 9-15-14(b), was erroneous as the findings necessary to support such an award were not made;



further, if the attorney's fee were based on O.C.G.A. § 19-6-2, it was also erroneous as there was no evidence of the parties' financial circumstances that authorized such an award. *Findley v. Findley*, 280 Ga. 454, 629 S.E.2d 222 (2006).

Trial court erred in awarding attorney fees to a publisher, absent a statutory basis for the award and evidence as to the reasonableness of the award; hence, the award was vacated and remand was ordered for the trial court to hold an evidentiary hearing on the amount and reasonableness of the fees. In *re Serpentfoot*, 285 Ga. App. 325, 646 S.E.2d 267 (2007), cert. denied, 2007 Ga. LEXIS 661 (Ga. 2007).

Award of attorney fees under O.C.G.A. § 9-15-14 had to be vacated and remanded for reconsideration since the trial court had not made findings of fact and conclusions of law supporting the award as such findings and conclusions were mandatory and did not have to be requested under O.C.G.A. § 9-11-52(a); furthermore, the lack of findings of fact and conclusions of law in the trial court's order overcame the presumption of regularity of all proceedings in a court of competent jurisdiction. *Gilchrist v. Gilchrist*, 287 Ga. App. 133, 650 S.E.2d 795 (2007).

In an election contest, the election winner was not entitled to attorney fees under O.C.G.A. § 9-15-14(a). Given the language of O.C.G.A. § 21-2-385(a) as to who could mail ballots for a voter, the complaint could not be described as lacking any justiciable issue of law or fact, and a sufficient number of ballots could have been found invalid so as to change the election result. *Kendall v. Delaney*, 283 Ga. 34, 656 S.E.2d 812 (2008).

Property owner's interpretation of O.C.G.A. § 22-1-11 was not so devoid of a justiciable issue or so lacking in substantial justification that it could not be reasonably believed that a court would accept that interpretation, such that an award of attorney fees against the owner pursuant to O.C.G.A. § 9-15-14(a) and (b) could not stand. *Fox v. City of Cumming*, 298 Ga. App. 134, 679 S.E.2d 365 (2009).

Trial court erred in holding an attorney in criminal contempt for violating an injunction and in ordering the attorney to

pay a fine, costs, and attorney fees under O.C.G.A. § 9-15-14 because the attorney did not violate a receivership order; the receivership order did not apply directly to the attorney, and the attorney, personally, neither filed the notice of lien nor took action to have the lien filed, but the attorney's client filed the lien pro se on the advice of another attorney. *Cabiness v. Lambros*, 303 Ga. App. 253, 692 S.E.2d 817 (2010).

Evidence was insufficient to support the trial court's award of attorney fees pursuant to O.C.G.A. § 9-15-14(b) because the record was devoid of any evidence of the actual cost and reasonableness of a seller's attorney fees. *Murray v. DeKalb Farmers Mkt., Inc.*, 305 Ga. App. 523, 699 S.E.2d 842 (2010).

Trial court erred in awarding attorney fees to an injured employee because initially allowing a subrogation lien viability hearing only after a liability award and subsequently sanctioning the employee's employer and its workers' compensation insurer for refusing to withdraw their lien on this basis was an abuse of discretion. *Austell HealthCare, Inc. v. Scott*, 308 Ga. App. 393, 707 S.E.2d 599 (2011).

Attorney fee award to sellers in a dispute between real property buyers and sellers was error under O.C.G.A. § 9-15-14 as there was evidence of mutual mistake to support the buyers' claim for contract reformation; accordingly, it was not lacking in substantial justification and a justiciable issue was presented. *Exec. Excellence, LLC v. Martin Bros. Invs., LLC*, 309 Ga. App. 279, 710 S.E.2d 169 (2011).

Trial court abused the court's discretion in awarding the insureds' attorney fees under O.C.G.A. § 9-15-14(b) because counsel for a parent and an administrator did not unnecessarily enlarge the proceedings and the proceedings were not interposed for harassment. *Kitchens v. Ezell*, 315 Ga. App. 444, 726 S.E.2d 461 (2012).

No evidence supported an award of attorney fees in favor of the insureds' under O.C.G.A. § 9-15-14(a) because the position of a parent and an administrator that no settlement was reached was legally supportable; accordingly, the claims of the parent and the administrator were not so



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devoid of a justiciable issue that it could not be reasonably believed that a court would accept the claims, nor did their opposition to the insureds' motion to enforce a settlement agreement lack substantial justification. *Kitchens v. Ezell*, 315 Ga. App. 444, 726 S.E.2d 461 (2012).

Trial court's order awarding attorney fees under O.C.G.A. § 9-15-14 was vacated because the order did not include the necessary findings of fact to support the award. *Hearn v. Dollar Rent A Car, Inc.*, 315 Ga. App. 164, 726 S.E.2d 661 (2012).

Because the trial court erred, in part, by granting summary judgment in favor of a rental company and an independent third party administrator, the trial court's attorney fees award under O.C.G.A. § 9-15-14(a) was vacated; without more specific factual findings in the trial court's order, the court of appeals could not determine what portion of the court's award related to the claims for which the court concluded genuine issues of material fact existed. *Hearn v. Dollar Rent A Car, Inc.*, 315 Ga. App. 164, 726 S.E.2d 661 (2012).

Trial court erred by awarding attorney fees against the plaintiff's counsel under O.C.G.A. § 9-15-14(a) and (b) for failing to dismiss the plaintiff's complaint or seek withdrawal immediately after the defendant filed a motion for summary judgment because the trial court erroneously relied on case law that was distinguishable from the facts involving the plaintiff's injury at a condominium unit that the plaintiff was visiting, which was being leased to a sibling without permission. *Michelman v. Fairington Park Condo. Ass'n*, 322 Ga. App. 316, 744 S.E.2d 839 (2013).

Trial court abused the court's discretion by awarding a father attorney fees under O.C.G.A. § 9-15-14 because the record established that the father voluntarily engaged in settlement negotiations with the mother, and the mother's failure to accept the validity of an informal, undocumented at-home paternity test did not render the mother's efforts to reach an agreement with the father substantially frivolous. *Patterson v. Hragyil*, 322 Ga. App. 329, 744 S.E.2d 851 (2013).

Trial court erred in awarding the son attorney fees in an action praying for cancellation of a deed and alleging fraud, undue influence, inadequate consideration, and improper recordation because no evidence supported the trial court's finding that the daughters defended the action without a lawful basis for doing so. *Williams v. Warren*, 322 Ga. App. 599, 745 S.E.2d 809 (2013).

Because the ex-husband had a factual basis for filing a motion to dismiss or, in the alternative, to modify the protective order as the husband had abided by the terms of the protective order, the purpose of the protective order had been accomplished, there was no longer any threat of family violence, and the restrictions in the protective order had created an undue burden on the husband's ability to obtain available employment as a law enforcement or security officer, the trial court erred in finding that the husband's motion lacked any justiciable issue of law or fact and the award of attorney fees to the wife could not stand. *Dalenberg v. Dalenberg*, 325 Ga. App. 833, 755 S.E.2d 228 (2014).

Because the ex-husband had a factual basis for filing a motion to dismiss or, in the alternative, to modify the protective order, and there was no evidentiary basis for the trial court's conclusion that the husband knew that the husband's Georgia Peace Officer Standards and Training certification would likely be revoked as a result of the prior termination of the husband's employment as a law enforcement officer or that the husband had misrepresented the ability to return to law enforcement, the husband's motion was not interposed for the purposes of harassment and the trial court erred in awarding attorney fees to the ex-wife. *Dalenberg v. Dalenberg*, 325 Ga. App. 833, 755 S.E.2d 228 (2014).

Trial court erred in awarding attorney fees to the employee without considering a potential setoff for amounts received from the employee's settlement with the employer's counsel and counsel's law firm and the amounts received from an insurance company pursuant to cost of defense payments made under the company's insurance policy. *LabMD, Inc. v. Savera*, 331 Ga. App. 463, 771 S.E.2d 148 (2015).



Trial court did not abuse the court's discretion by denying the plaintiff's motion for attorney fees pursuant to O.C.G.A. § 9-15-14(a) because there was evidence to support the trial court's finding that the defendant's admissions did not rise to the level of showing a complete absence of any justiciable issue of law or fact, and that the defense was not substantially frivolous. *Chadwick v. Brazell*, 331 Ga. App. 373, 771 S.E.2d 75 (2015).

**Award of fees was proper.** — Based on the plain and unambiguous language of O.C.G.A. § 9-15-14, no error was found in the trial court's inclusion in the court's award of attorney's fees to a wife, the fees she incurred for appellate proceedings that occurred during the pendency of the divorce proceedings. *Kautter v. Kautter*, 286 Ga. 16, 685 S.E.2d 266 (2009).

Trial court's award of attorney fees in favor of a seller pursuant to O.C.G.A. § 9-15-14(b) was proper because the trial court gave the buyer ample opportunity to challenge both the cost and reasonableness of the seller's attorney fees, but the buyer did not challenge either the amount or the reasonableness of such fees, and the buyer did not object to the trial court's method of determining the amount of the seller's attorney fees or otherwise request a hearing on the matter; therefore, the buyer acquiesced in the trial court's procedure and could not complain of the procedure. *Murray v. DeKalb Farmers Mkt., Inc.*, 305 Ga. App. 523, 699 S.E.2d 842 (2010).

Trial court did not err in ordering the mother and the mother's attorney to pay the grandmother's attorney's fees related to a contempt motion as both the mother and the attorney knew that the visitation order contained a typographical error, referring to "respondent" instead of "petitioner," and that their claims were made in bad faith. *In re Singleton*, 323 Ga. App. 396, 744 S.E.2d 912 (2013).

Trial court did not err in granting the law clerks' motion for attorney fees as a sanction due to the county's opposition to the clerks' motion to confirm an arbitration award with respect to the clerks' group-pay grievance that was resolved in the clerks' favor as the county's argument lacked a justiciable issue of law and

lacked substantial justification. *Fulton County v. Lord*, 323 Ga. App. 384, 746 S.E.2d 188 (2013).

Attorney fee award related to the wife's contempt motion was supported by the trial court's findings in the supplemental order, which specified that the award was made pursuant to O.C.G.A. § 9-15-14, because the husband lacked substantial justification to refuse to honor the prior agreement the parties reached in open court. *McCarthy v. Ashment-McCarthy*, 295 Ga. 231, 758 S.E.2d 306 (2014).

**Award of more than actual fees billed was proper.** — Hindu temple's serial filing of civil complaints against individuals lawfully reporting alleged unlawful credit card fraud activity by the temple violated the anti-SLAPP statute, O.C.G.A. § 9-11-11.1, and an award of attorney's fees under O.C.G.A. § 9-15-14 for the reasonable value of the individuals' attorney's services was proper. The trial court was not limited in making the award to the amount that the attorney actually billed the clients. *Hindu Temple & Cmty. Ctr. of the High Desert, Inc. v. Raghunathan*, 311 Ga. App. 109, 714 S.E.2d 628 (2011), cert. dismissed, No. S11C1887, 2012 Ga. LEXIS 49 (Ga. 2012).

**Award of hourly fees to two county salaried attorneys was proper.** — In awarding attorney's fees for vexatious litigation under O.C.G.A. § 9-15-14(b), a trial court did not err in awarding \$250 per hour and \$225 per hour for two county attorneys, although the attorneys were not paid hourly but were salaried employees; there was no evidence that this was not a reasonable fee given these attorneys' experience. *Jones v. Unified Gov't of Athens-Clarke County*, 312 Ga. App. 214, 718 S.E.2d 74 (2011), cert. denied, No. S12C0387, 2012 Ga. LEXIS 228 (Ga. 2012).

**Violation by attorney justifying award.** — When, in a divorce proceeding, the husband's attorney violated O.C.G.A. § 9-11-67 and pertinent court rules by making an improper deposit of funds in the court, the court properly awarded attorney's fees paid to the wife personally by the husband's attorney either on the basis that the actions of the latter constituted contempt, or as a sua sponte award of



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attorney's fees. *Cohen v. Feldman*, 219 Ga. App. 90, 464 S.E.2d 237 (1995), overruled on other grounds by *Williams v. Cooper*, 280 Ga. 145, 625 S.E.2d 754 (2006).

When the plaintiff, an attorney, did not make any specific allegations of malpractice against the plaintiff's former counsel in a divorce action until the plaintiff responded to the defendant's motion for summary judgment, even then never demonstrating any legal basis for the plaintiff's claim that a particular communication constituted a breach of confidentiality, and since the plaintiff's action was brought for purposes of harassment, it was not an abuse of discretion for the court to award attorney's fees against the plaintiff. *Cagle v. Davis*, 236 Ga. App. 657, 513 S.E.2d 16 (1999).

**Section does not apply to federal bankruptcy proceedings.** — O.C.G.A. § 9-15-14 does not authorize an award for attorney's fees or expenses for proceedings before a federal bankruptcy court; application of the statute is limited to courts of record when the Georgia Civil Practice Act, O.C.G.A. Ch. 11, T. 9, applies. *Harkleroad v. Stringer*, 231 Ga. App. 464, 499 S.E.2d 379 (1998).

Bankruptcy court denied a Chapter 13 debtor's ex-wife's request for reimbursement of attorneys' fees she incurred to obtain a judgment against the debtor which found that a state court's award of attorneys' fees in her divorce action was a debt in the nature of support that was nondischargeable under 11 U.S.C. § 523(a)(5) and was entitled to priority under 11 U.S.C. § 507(a)(1). Nothing in the state court's order awarding the ex-wife attorneys' fees allowed her to recover additional fees for enforcing the order, and there was no merit to the ex-wife's claims that she was entitled to the additional fees under O.C.G.A. § 19-6-2, and under O.C.G.A. § 9-15-14 because the debtor had acted in bad faith. *Owoade-Taylor v. Babatunde* (In re Babatunde), No. 11-5564, 2012 Bankr. LEXIS 5053 (Bankr. N.D. Ga. Oct. 10, 2012).

**Applicability.** — Because O.C.G.A. § 9-11-11.1, the anti-SLAPP statute, was

not intended to immunize from the consequences of abusive litigation a party who asserted a claim with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, the statute did not apply to a county's claim for attorney's fees under O.C.G.A. § 9-15-14, after the county was granted summary judgment on a property buyer's complaint alleging that the buyer was entitled to a written verification of zoning compliance; hence, the trial court did not err in denying the county's motion to dismiss the county's request. *EarthResources, LLC v. Morgan County*, 281 Ga. 396, 638 S.E.2d 325 (2006).

**O.C.G.A. § 9-15-14 does not authorize award to nonparties.** — It was error for a trial court to award a hospital attorney fees and expenses incurred in resisting a subpoena issued in a lawsuit to which the hospital was not a party because: (1) under O.C.G.A. § 9-15-14(d), such fees and expenses awarded under § 9-15-14 could not exceed amounts reasonable and necessary to defend or assert the rights of a party, meaning a party to the litigation; and (2) the hospital was not a party to the case in which the subpoena was issued. *Reeves v. Upson Reg'l Med. Ctr.*, 315 Ga. App. 582, 726 S.E.2d 544 (2012).

There is no reason to think that "party," as that term is used in O.C.G.A. § 9-15-14(d), regarding an award of attorney fees, means anything other than a named party to litigation, and attorney's fees, and expenses incurred by a nonparty in the defense or assertion of the nonparty's own rights were not, by definition, fees and expenses "which are reasonable and necessary for defending or asserting the rights of a party," so attorney's fees and expenses under § 9-15-14(b) generally could not be awarded to a nonparty and, to the extent *Slone v. Myers*, 288 Ga. App. 8 (653 SE2d 323) (2007) held otherwise, it was overruled. *Reeves v. Upson Reg'l Med. Ctr.*, 315 Ga. App. 582, 726 S.E.2d 544 (2012).

**Alleged alter ego of corporate plaintiff** was not a "party" in the case and the court was without authority to impose



attorney's fees against that alter ego. *Steven E. Marshall, Bldr., Inc. v. Scherer*, 206 Ga. App. 156, 424 S.E.2d 841 (1992).

When county commissioners sought litigation costs under O.C.G.A. § 9-15-14 against a citizen against whom they obtained summary judgment on the 45th day following judgment, that did not extend the citizen's time within which to seek attorney's fees against the commissioners for seeking sanctions against the citizen under the same statute. *Trammel v. Clayton County Bd. of Comm'rs*, 250 Ga. App. 310, 551 S.E.2d 412 (2001).

**Ongoing estate administration did not affect award of attorney fees.** — Probate court's judgment finding a caveat to a will meritless and awarding attorney's fees was final and appealable, even though administration of the estate was ongoing. *Dismer v. Luke*, 228 Ga. App. 638, 492 S.E.2d 562 (1997).

**Fees to be assessed against executor, not estate.** — Since the probate court found that an executor kept an estate open without legitimate reason, disregarded court orders, breached the executor's fiduciary duty to the estate, and unnecessarily expanded the proceedings once a petition for accounting had been filed, such that an award of attorney fees to the petitioner was warranted under O.C.G.A. § 9-15-14(b), those fees had to be assessed against the executor, not the estate. *In re Estate of Holtzclaw*, 293 Ga. App. 577, 667 S.E.2d 432 (2008).

**Award not mandated whenever party prevails on abusive litigation claim.** — Although subsection (a) of O.C.G.A. § 9-15-14 requires the award of attorney's fees and litigation expenses upon a proper determination, it does not mandate an award whenever a party prevails on an abusive litigation claim. Subsection (f) of § 9-15-14 vests the trial court, without a jury, with responsibility for determining whether an award should be made. *Deljou v. Sharp Boylston Mgt. Co.*, 194 Ga. App. 505, 391 S.E.2d 27 (1990).

**Effect of failure to grant summary judgment.** — Trial court's award to a party whose motion for summary judgment was denied must be vacated except in unusual cases when the trial judge

could not, at the summary judgment stage, foresee facts authorizing the grant of attorney's fees. *Felker v. Fenlason*, 201 Ga. App. 207, 410 S.E.2d 326 (1991).

Sanctions against the plaintiff pursuant to O.C.G.A. § 9-15-14 were improperly assessed after the trial court denied the defendant's motion for summary judgment and, after hearing all the facts which had been presented to the jury, denied the defendant's motion for a directed verdict. *Gantt v. Bennett*, 231 Ga. App. 238, 499 S.E.2d 75 (1998).

In a HOA's action against homeowners for violation of a garage storage covenant, in which it was determined that the owners were not bound by the covenant under O.C.G.A. § 44-3-226(a) or O.C.G.A. § 44-5-60(d)(4), and the HOA dismissed the HOA's remaining claim, the owners were the prevailing parties entitled to attorney fees under the declaration; however, the trial court did not err in denying attorney fees under O.C.G.A. § 9-15-14(b) given the denial of summary judgment. *Marino v. Clary Lakes Homeowners Ass'n*, 331 Ga. App. 204, 770 S.E.2d 289 (2015).

**Effect of denial of directed verdict.** — In considering an award under O.C.G.A. § 9-15-14, a trial court is not necessarily bound by the denial of a motion for a directed verdict. *Atwood v. Southeast Bedding Co.*, 236 Ga. App. 116, 511 S.E.2d 232 (1999).

**Attorney's fees improper following grant of interlocutory injunction.** — Trial court erred in granting attorney's fees under subsection (a) of O.C.G.A. § 9-15-14 because the grant of an interlocutory injunction was a determination that there was a substantial likelihood of success on the merits and was equivalent to denial of a motion for summary judgment so that the subsection did not apply. *Hallman v. Emory Univ.*, 225 Ga. App. 247, 483 S.E.2d 362 (1997).

**Clear lack of adversity in interpleader action.** — Since there is no evidence that the lack of adversity was not clear when the plaintiff brought the plaintiff's interpleader action, and the plaintiff's conduct in bringing the action falls within the criteria of O.C.G.A. § 9-15-14, the defendants were entitled to attorney's fees. *Citizens & S. Trust Co. v. Trust Co.*



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Bank, 262 Ga. 345, 417 S.E.2d 148 (1992).

**Adjudication of claims.** — Claims asserted pursuant to O.C.G.A. § 9-15-14 are to be adjudicated by the trial court without a jury. *Ferguson v. City of Doraville*, 186 Ga. App. 430, 367 S.E.2d 551, cert. denied, 186 Ga. App. 918, 367 S.E.2d 551 (1988), overruled on other grounds, *Vogle v. Coleman*, 259 Ga. 115, 376 S.E.2d 860 (1989).

**When final disposition occurred.** — When, on appeal by caveators from summary judgment in favor of the proponents of a will, the decision was affirmed and, after remittitur, the superior court entered an order admitting the will to probate, final disposition of the action for the purposes of O.C.G.A. § 9-15-14 occurred when that order was entered, not when the summary judgment motion was granted. *McConnell v. Moore*, 232 Ga. App. 700, 503 S.E.2d 593 (1998).

**Section inapplicable when all claims mutually dismissed.** — In providing in subsection (e) of O.C.G.A. § 9-15-14 that a party could move for attorney's fees and expenses within 45 days of "final disposition" of a case, the legislature certainly did not mean to include per se a case when the claiming party has induced or achieved, by mutual dismissal of all then-pending claims or counterclaims, a dismissal with prejudice of the other's claims, actions, or defenses, particularly if the claiming party achieved the other's agreement to dismiss with prejudice by consenting to and proclaiming by court order that the "mutual dismissals ... are a fair and reasonable settlement of all claims in this action under all the facts and circumstances of this case..." *Hunter v. Schroeder*, 186 Ga. App. 799, 368 S.E.2d 561 (1988).

**Following dismissal, witness seeking fees brings separate suit.** — Following a dismissal of a case with prejudice, an expert witness brought a motion to compel the plaintiffs to pay the witness's fees. The court properly dismissed the motion on the ground that the court no longer had jurisdiction of the matter. The proper remedy was to bring a separate suit. *Ramos v. Vourtsanis*, 187 Ga. App.

69, 369 S.E.2d 344 (1988).

**Contempt.** — Any prohibition against an award of attorney's fees in a contempt action is limited to criminal contempt actions if it exists at all. *Minor v. Minor*, 257 Ga. 706, 362 S.E.2d 208 (1987).

Imposition of attorney's fees for failure to comply with a contempt order did not constitute improper punishment. *Wright v. Stuart*, 229 Ga. App. 50, 494 S.E.2d 212 (1997).

**Condemnation proceedings.** — O.C.G.A. § 9-15-14, read in conjunction with Ga. Const. 1983, Art. I, Sec. III, Para. I, permits trial courts to award attorney's fees to condemnees in eminent domain cases. *DOT v. Woods*, 269 Ga. 53, 494 S.E.2d 507 (1998).

Fees were not recoverable in a condemnation case based on the fact that the jury awarded the condemnee nearly twice what the condemnor had offered to pay. *DOT v. Woods*, 269 Ga. 53, 494 S.E.2d 507 (1998).

When a city continued to pursue condemnation until after the special master made its award and after the condemnees filed an appeal as to valuation issues, and at that point elected to redesign the project and to dismiss its condemnation proceeding, because that decision resulted in a financial detriment to the condemnees, the trial court could, in the exercise of the court's discretion, find that the city was liable for attorney's fees under subsection (b) of O.C.G.A. § 9-15-14. *McKemie v. City of Griffin*, 272 Ga. 843, 536 S.E.2d 66 (2000), affirming, in part, *City of Griffin v. McKemie*, 240 Ga. App. 180, 522 S.E.2d 288 (1999).

**Eminent domain actions.** — Lessee's motion for attorney's fees pursuant to O.C.G.A. § 9-15-14(b) against the state in an eminent domain action was improperly denied; although the trial court concluded that the state was justified in bringing the action, the court failed to address whether the state bore some responsibility for unnecessarily expanding the proceedings by entering into a settlement with the owner of the property in question. *Lamar Co., LLC v. State*, 256 Ga. App. 524, 568 S.E.2d 752 (2002).

In a suit brought by a purchaser seeking damages for wrongful foreclosure of



certain real property after two foreclosure sales, the trial court erred in granting the second foreclosing bank attorney fees under O.C.G.A. § 9-15-14 based on frivolous litigation since the second bank had knowledge of the purchaser's acquisition of the property via the first foreclosure, therefore, the purchaser's suit did not lack substantial justification as to the second bank and the second's bank failure to provide proper notice of the sale to the purchaser. *Royston v. Bank of Am., N.A.*, 290 Ga. App. 556, 660 S.E.2d 412 (2008).

**Award to judge improper.** — Trial court erred when the court awarded a judge attorney's fees for defending a suit the county had been forced to file against the judge. *Spalding County v. Cramer*, 262 Ga. 843, 426 S.E.2d 149 (1993).

Judge was only entitled to recover reasonable attorney fees for the counterclaims that lacked legal justification. *Heiskell v. Roberts*, 295 Ga. 795, 764 S.E.2d 368 (2014).

**Judge who found attorney in contempt recused.** — Affidavit in support of recusal was legally sufficient in a situation in which the judge who found an attorney in contempt in the underlying case was to hear a claim against the same attorney for costs and attorney's fees under O.C.G.A. § 9-15-14. *Houston v. Cavanagh*, 199 Ga. App. 387, 405 S.E.2d 105, cert. denied, 199 Ga. App. 906, 405 S.E.2d 105 (1991).

**Attorney's fees not recoverable in commitment proceedings.** — There is no statutory authority for the award of attorney's fees to a patient who was ordered discharged in involuntary commitment proceedings under O.C.G.A. Ch. 3, T. 37. *Georgia Mental Health Inst. v. Brady*, 263 Ga. 591, 436 S.E.2d 219 (1993).

**Inapplicable to municipal ordinance violations as quasi-criminal cases.** — Prosecution for violation of a city or county ordinance is a "quasi-criminal" case having the nature of a criminal case, and when a party convicted of an ordinance violation files a petition for certiorari in superior court seeking review of the conviction, the proceeding in superior court is criminal and not civil, and the cost and fees provisions of O.C.G.A. § 9-15-14 are inapplicable.

*DeKalb County v. Gerard*, 207 Ga. App. 43, 427 S.E.2d 36 (1993).

**O.C.G.A. § 9-15-14 does not authorize the award against nonparties.** *Allstate Ins. Co. v. Reynolds*, 210 Ga. App. 318, 436 S.E.2d 56 (1993); *Swafford v. Bradford*, 225 Ga. App. 486, 484 S.E.2d 300 (1997).

**Pre-disposition counterclaim premature.** — Word "may" in subsection (e) of O.C.G.A. § 9-15-14 means that the litigant is only authorized to seek an award after the case is concluded, when the basis for an award has matured, and such an award may not be sought by counterclaim filed prior to the final disposition of the action. *Hutchison v. Divorce & Custody Law Ctr.*, 207 Ga. App. 421, 427 S.E.2d 784 (1993); *Generali — United States Branch v. Owens*, 218 Ga. App. 584, 462 S.E.2d 464 (1995); *Swafford v. Bradford*, 225 Ga. App. 486, 484 S.E.2d 300 (1997).

**Sanctions.** — Trial court misconstrued the clear terms of O.C.G.A. § 9-15-14 by concluding that the jury should decide whether sanctions should be awarded for bringing frivolous litigation. *Dismer v. Luke*, 228 Ga. App. 638, 492 S.E.2d 562 (1997).

Because a valid general release entered into by a home buyer and home builder effectuated a binding accord and satisfaction barring any future claims between the parties, and absent evidence to void the release based on fraud, the buyer's filed claims in a subsequent suit filed against the home builder were properly summarily dismissed; thus, assessment of attorney fees was not an abuse of discretion and a penalty for filing a frivolous appeal was ordered. *Pacheco v. Charles Crews Custom Homes, Inc.*, 289 Ga. App. 773, 658 S.E.2d 396 (2008).

**Award excludable as sanction under insurance policy.** — It was not error for the trial court to conclude that an award of attorney's fees under O.C.G.A. § 9-15-14 was a sanction within the meaning of the exclusion contained in the attorney's insurance policy. *Dixon v. Home Indem. Co.*, 206 Ga. App. 623, 426 S.E.2d 381 (1992).

**Justification issue found.** — When the record revealed hotly contested versions of what the parties considered to



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have transpired in a complex real estate transaction, given that the law requires only slight circumstances to establish fraud and conspiracy, the trial judge was authorized to find as a matter of law that the plaintiffs had pierced an essential element of the defendant's abusive litigation claim and were thus entitled to a grant of summary judgment thereon. *Seckinger v. Holtzendorf*, 200 Ga. App. 604, 409 S.E.2d 76, cert. denied, 200 Ga. App. 897, 409 S.E.2d 76 (1991).

Although most of the claims by real property sellers warranted an attorney fee award to the buyers pursuant to O.C.G.A. § 9-15-14, as some claims were deemed lacking in substantial justification, there was sufficient justification to support the allegations of slander of title claims based on certain statements; accordingly, a remand for determination of which portion of the fees were allocable to which claims was warranted under § 9-15-14(d). *Exec. Excellence, LLC v. Martin Bros. Invs., LLC*, 309 Ga. App. 279, 710 S.E.2d 169 (2011).

**Sanction award based on attorney misconduct but dismissal unauthorized.** — With regard to the landowners' declaratory judgment, mandamus, and injunctive relief suit seeking damages against a town and the town's officials alleging the unconstitutionality and invalidity of an overlay zoning district, the evidence of misconduct by the landowners' counsel in seeking an interlocutory injunction was sufficient to support the trial court's sanction award to the town and established that the trial court's award was not an abuse of discretion since the trial court's finding that the landowners' counsel knowingly and willfully presented an inaccurate and false survey in an effort to defraud the court, subvert justice, and gain an unfair advantage was a finding constituting a sufficient specification of the conduct which entitled the town to attorney's fees and costs. However, the trial court erred by dismissing the landowners' complaint based on the sanction order as dismissal of an action was not an authorized remedy under the sanction statute of O.C.G.A. § 9-15-14. *Century*

*Ctr. at Braselton, LLC v. Town of Braselton*, 285 Ga. 380, 677 S.E.2d 106 (2009).

**Improper conduct of opposing party or counsel.** — In exercising judicial discretion whether to award attorney's fees under subsection (b) of O.C.G.A. § 9-15-14, the trial court could consider as one factor whether the opposing party or opposing counsel also contributed to the unnecessary expansion of the proceeding by any relevant form of improper conduct. *Hyre v. Denise*, 214 Ga. App. 552, 449 S.E.2d 120 (1994).

After entering judgment for the defendant in an action for grandparent's visitation, the trial court abused the court's discretion in deciding the defendant's motion for attorney's fees without properly reviewing the defendant's claim that the grandparents harassed the defendant or unnecessarily expanded the proceedings by other improper conduct. *McKeen v. McKeen*, 224 Ga. App. 410, 481 S.E.2d 236 (1997).

Attorney's fees were properly awarded to the plaintiff in a trespass action since the defendant was responsible for both the court's and the plaintiff's difficulty in locating the defendant for service of process and other proceedings and because the defendant also was the attorney of record; the fact that the defendant was out of the country at certain times did not excuse the defendant's failure to appear or take actions as the defendant did not seek or obtain permission for the defendant's absences. *Hipple v. Simpson Paper Co.*, 234 Ga. App. 516, 507 S.E.2d 156 (1998).

**Award of attorney's fees for improper conduct.** — In domestic dispute over visitation rights, an award of attorney's fees was appropriate under subsection (b) of O.C.G.A. § 9-15-14 based on the defendant's resistance to being deposed and the defendant's failure to timely disclose to the trial court that the defendant and the defendant's daughter had relocated out of state. *Hall v. Hall*, 241 Ga. App. 690, 527 S.E.2d 288 (1999).

Trial court properly exercised the court's discretion in awarding attorney's fees under O.C.G.A. § 9-14-15(b) as the court made an award based on the finding that during the divorce proceedings, the



husband refused to comply with the wife's multiple requests for production of documents, filed extraordinary motions, rejected multiple settlement offers, and moved to reopen discovery six months after discovery had concluded; although the husband argued that such events did not occur or that the events were justifiable, the trial court was authorized to resolve conflicts in the evidence. *Carson v. Carson*, 277 Ga. 335, 588 S.E.2d 735 (2003).

Based on conduct by a husband during the litigation with the wife in a manner intended to prevent completion of the case, to harass and annoy the wife, and to cause the wife's attorney fees to increase, sufficient evidence was presented supporting an attorney fee award under O.C.G.A. § 9-15-14(b); moreover, the wife's counsel's statement as to the reasonableness of the attorney's fees was sufficient and the husband's failure to question the wife's counsel or seek more information waived any complaint regarding those issues. *Taylor v. Taylor*, 282 Ga. 113, 646 S.E.2d 238 (2007).

Since the evidence supported the trial court's findings that a former spouse had unreasonably extended the litigation by denying being represented by an attorney and by refusing to acknowledge the attorney's authority to enter into a settlement agreement, under O.C.G.A. § 9-15-14, the other spouse was properly awarded the attorney fees incurred in enforcing the agreement. *Ford v. Hanna*, 293 Ga. App. 863, 668 S.E.2d 271 (2008).

Fact that a personal representative prolonged administration of the estate so the personal representative could wrongfully have the estate's primary asset, a house, conveyed to the personal representative entitled the beneficiary to litigation expenses, including attorney fees, under O.C.G.A. §§ 9-15-14(b) and 13-6-11. In re *Estate of Zeigler*, 295 Ga. App. 156, 671 S.E.2d 218 (2008).

**Bad faith insurance claims.** — In an insured's suit asserting claims for breach of contract and bad faith breach of contract under O.C.G.A. §§ 9-2-20 and 33-4-6 in connection with an insurer's denial of the insured's claim for proceeds of a disability insurance policy, the parent corpo-

ration of the insurer, which administered the insurer's policies, was not liable upon the insured's claim for attorney fees and expenses under O.C.G.A. § 9-15-14 because even if the insured had succeeded on its underlying claims against the parent, § 33-4-6 provides the exclusive remedy for fees and costs in cases involving bad faith refusal to pay insurance proceeds. *Adams v. UNUM Life Ins. Co. of Am.*, 508 F. Supp. 2d 1302 (N.D. Ga. 2007).

**Harassing a cosigner to pay debt.** — When a jury could reasonably infer from the evidence that, by pursuing an action against a cosigner, a bank had sought to harass or intimidate the cosigner into paying one or more debts for which the cosigner had no arguable legal responsibility, a recovery of damages for substantially frivolous, substantially groundless, or substantially vexatious litigation would clearly be authorized. *Whatley v. Bank S.*, 185 Ga. App. 896, 366 S.E.2d 182, cert. denied, 185 Ga. App. 911, 366 S.E.2d 182 (1988).

**Failure of a party to agree to telephonic depositions** cannot form the basis of an award of attorney's fees and expenses when there was no evidence of the inappropriateness of the refusal at the time thereof. *Ingram v. Star Touch Communications, Inc.*, 215 Ga. App. 329, 450 S.E.2d 334 (1994).

**Willful concealment of important document.** — In an action for breach of an employment contract, the trial court did not abuse the court's discretion by awarding \$75,000 in legal fees and expenses against the defendant when the court found that the defendant willfully attempted to conceal a document which could have had a major impact on the litigation. *Santora v. American Combustion, Inc.*, 225 Ga. App. 771, 485 S.E.2d 34 (1997).

**Summary judgment denial does not preclude award.** — Denial of summary judgment does not preclude as a matter of law the exercise of the trial court's discretion under O.C.G.A. § 9-15-14 to award litigation costs and attorney's fees for frivolous actions and defenses upon the trial of the case. *Porter v. Felker*, 261 Ga. 421, 405 S.E.2d 31 (1991).



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Denial of the accountants' motion for summary judgment in their clients' negligence suit against the accountants did not require reversal of the trial court's judgment awarding the accountants damages under *Yost v. Torak*, 256 Ga. 92, 344 S.E.2d 414 (1986) since denial of the motion was not a determination whether the suit lacked substantial justification as the trial court was never required to address or otherwise foresee facts authorizing the grant of attorney fees under *Yost* regarding the merits of the complaint. *Ansa Mufflers Corp. v. Worthington*, 201 Ga. App. 602, 411 S.E.2d 573 (1991).

**Summary judgment denial precludes award.** — Denial of a defendant's motion for summary judgment on the main claim constitutes a binding determination that the claim did not lack substantial justification so as to render the claim frivolous, groundless, or vexatious, and as a result the defendant is not entitled to an award of damages under *Yost v. Torak*, 256 Ga. 92, 344 S.E.2d 414 (1986) or O.C.G.A. § 9-15-14. *Contractors' Bldg. Supply, Inc. v. Gwinnett Sash & Door, Inc.*, 199 Ga. App. 38, 403 S.E.2d 844 (1991).

Award of attorney's fees to a party whose motion for summary judgment was denied was reversed since the suit was not an unusual case in which the trial judge could not, at the summary judgment stage, foresee facts authorizing the grant of attorney's fees. *Hamm v. Willis*, 201 Ga. App. 723, 411 S.E.2d 771 (1991).

**Compensatory or punitive damages not authorized.** — O.C.G.A. § 9-15-14 speaks only to an award of reasonable and necessary attorney's fees and litigation expenses; the statute does not authorize the trial court to impose compensatory or punitive damages. *Green v. Sheppard*, 173 Bankr. 799 (Bankr. N.D. Ga. 1994).

**Assessment of fees.** — In assessing attorney's fees against a party, or the party's attorney, pursuant to O.C.G.A. § 9-15-14, the trial judge must make an independent determination concerning the reasonableness and necessity of the fees and the trial judge cannot make such a determination unless evidence of the value of the legal services is presented.

*Duncan v. Cropsey*, 210 Ga. App. 814, 437 S.E.2d 787 (1993).

**Fees for litigation against client.** — Court erred in denying the firm's request for legal fees for services provided to themselves in litigation against the client. *Harkleroad v. Stringer*, 231 Ga. App. 464, 499 S.E.2d 379 (1998).

**Comparable components in an award of attorneys' fees.** — Personal time spent by attorneys in the attorneys' own defense was not a compensable component in an award of attorneys' fees since the attorneys were in fact the defendants in the case, did not appear as counsel of record, and had engaged independent attorneys to represent them. *Moore v. Harris*, 201 Ga. App. 248, 410 S.E.2d 804 (1991).

**Defendant's claim asserted as compulsory counterclaim.** — Under *Yost v. Torok*, 256 Ga. 92, 344 S.E.2d 414 (1986), a defendant's claim for abusive litigation is an independent claim for damages but the claim must be asserted as a compulsory counterclaim without regard to whether the claimant is the plaintiff or the defendant in the original suit. *Vogle v. Coleman*, 259 Ga. 115, 376 S.E.2d 861 (1989).

**Attorney's fees for an offer of settlement.** — Because the plaintiff asserted a claim for punitive damages, and such claim was pending at the time the offer of settlement was made, the defendant was required to state with particularity the amount proposed to settle that claim, which the defendant failed to do, thus, the defendant's offer did not meet the requirements of O.C.G.A. § 9-11-68(a), and the trial court did not err in ruling that the defendant could not recover attorney fees for an offer of settlement pursuant to that Code section. *Chadwick v. Brazell*, 331 Ga. App. 373, 771 S.E.2d 75 (2015).

**Award of attorney's fees was proper if suit was not justified.** — Trial court properly dismissed the appellee city from the action because there was no basis for the action against the city; because the appellant could have made this determination with a minimum amount of diligence, the award of attorney's fees to the appellee city was affirmed. *Stancil v. Gwinnett County*, 259 Ga. 507, 384 S.E.2d 666 (1989).



When a landlord sued a tenant for rent that accrued after the landlord locked the tenant out, the jury had evidence from which the jury could find that the dispossessory warrant and claim for unpaid rent was used as a device to extract money from the tenant and to harass the tenant, and that the tenant therefore had a viable claim under O.C.G.A. § 9-15-14. *Swift Loan & Fin. Co. v. Duncan*, 195 Ga. App. 556, 394 S.E.2d 356 (1990).

When there was no ambiguity in a contract which could result in a verdict for the plaintiff, and under the other facts of the case, the trial court did not abuse the court's discretion in finding the suit lacked substantial justification, that is, that the suit was substantially groundless. *Brunswick Floors, Inc. v. Carter*, 199 Ga. App. 110, 403 S.E.2d 855 (1991), cert. denied, 199 Ga. App. 905, 403 S.E.2d 855 (1991).

In a legal malpractice action filed subsequent to the running of the four-year statute of limitations, when there was no evidence giving rise to factual merit in the plaintiff's claim that the limitations statute was tolled due to fraud, and when there existed no justiciable issue of law as to such claim, the trial court erred in denying the defendant attorney's motion for attorney's fees. *Brown v. Kinser*, 218 Ga. App. 385, 461 S.E.2d 564 (1995).

When both the plaintiff and the plaintiff's counsel were put on notice by a letter from the defendant's counsel that the plaintiff's car was not damaged as the result of a collision with the defendant's vehicle but as the result of a previous, unrelated, collision, the plaintiff's action lacked substantial justification or any justiciable issue of law or fact and the defendant was entitled to attorney's fees. *Gibbs v. Abiose*, 235 Ga. App. 214, 508 S.E.2d 690 (1998).

When the trial court found that the defendant's testimony concerning the defendant's inspection damages received from the plaintiff did not provide a reasonable basis under O.C.G.A. § 11-2-714 (breach in regard to accepted goods) for proving damages, that portions of the defendant's testimony were "arbitrary" and others were irreconcilably inconsistent with the remainder of the defendant's testimony, the court's conclusion that this

defense and counterclaim lacked substantial justification, was void of any justiciable issue of law or fact, and that it was "interposed . . . for delay or harassment and to intentionally and unnecessarily expand the proceeding" justified the court's award of attorney's fees in favor of the plaintiff. *Atwood v. Southeast Bedding Co.*, 236 Ga. App. 116, 511 S.E.2d 232 (1999).

Record was sufficient to show that the plaintiff knew when the plaintiff filed the suit that the financial institution's refusal to cancel the instrument was based on a bona fide controversy and a good faith belief that the debt had not been paid and, therefore, the plaintiff had no cause of action for the damages the plaintiff sought for alleged violation of O.C.G.A. § 44-14-3; thus, the trial court did not abuse the court's discretion when the court awarded attorney's fees to the financial institution pursuant to O.C.G.A. § 9-15-14(b). *Tahamtan v. Chase Manhattan Mortg. Corp.*, 252 Ga. App. 113, 555 S.E.2d 76 (2001).

In a proceeding seeking confirmation of an arbitrator's award in a home construction dispute, it was not error for a trial court to award a builder attorney's fees under O.C.G.A. § 9-15-14(b) against homeowners who presented no factual or legal issues even approaching any of the statutory grounds, under O.C.G.A. § 9-9-13(b), for vacating an arbitration award and unnecessarily expanded the confirmation proceeding by moving to vacate the award and objecting to the addition of their surety as a party, and the arbitrator's failure to award attorney's fees in no way restricted the trial court's authority to do so. *Marchelletta v. Seay Constr. Servs.*, 265 Ga. App. 23, 593 S.E.2d 64 (2004).

In a case in which a lessee sought attorney's fees from a lessor pursuant to O.C.G.A. §§ 9-15-14 and 13-6-11, the lessor unsuccessfully appealed the district court's award of attorney's fees. Not only had the lessee submitted evidence to support the award of attorney's fees, but the district court found that the lessor had been stubbornly litigious and had asserted baseless claims and defenses. *Cargill Ltd. v. Jennings*, No. 08-14484,



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2009 U.S. App. LEXIS 1090 (11th Cir. Jan. 22, 2009) (Unpublished).

Attorney's fees were properly awarded under O.C.G.A. § 9-15-14(a) in an election contest because the contestor did not present any evidence showing a factual basis to cast doubt on the counting of a single vote, but instead presented website information, which had nothing to do with any miscounting of votes or the mishandling of any absentee ballots. *Davis v. Dunn*, 286 Ga. 582, 690 S.E.2d 389 (2010).

**Award proper under "any evidence" standard.** — Award of attorney fees under O.C.G.A. § 9-15-14(a) was proper under the "any evidence" standard because there was evidence in the record supporting the trial court's findings as to the lack of predicate acts supporting racketeering claims and the lack of evidence of damages; thus, the appellate court did not need to reach the issue of whether the award was justified under § 9-15-14(b). *Slone v. Myers*, 288 Ga. App. 8, 653 S.E.2d 323 (2007), cert. denied, 555 U.S. 881, 129 S. Ct. 196, 172 L.Ed.2d 140 (2008).

**Award of litigation expenses and attorney's fees justified.** — In an action seeking sanctions for abuse of litigation, the trial court erred in denying the plaintiff's motion under subsections (a) and (b) of O.C.G.A. § 9-15-14 after the evidence showed that the tactics employed by the defendants warranted sanctions. *Harkleroad & Hermance, P.C. v. Stringer*, 220 Ga. App. 906, 472 S.E.2d 308 (1996).

County's reliance, as a defense to a developer's mandamus and inverse condemnation claim, on the memo of the county's expert, asserting that the developer had to comply with a list of road improvements contained in the memo, which improvements were not required by the county's ordinance, supported a trial court's award of attorney fees for the developer. *Rabun County v. Mt. Creek Estates, LLC*, 280 Ga. 855, 632 S.E.2d 140 (2006).

**Pre-judgment interest proper.** — Trial court did not err in awarding pre-judgment interest under O.C.G.A. § 51-12-14 because there remained a balance on an attorney's fees award under

O.C.G.A. § 9-15-14, that survived the appeal and that was not paid by the insurer, and was no longer subsumed in a later judgment. To the extent that *Restina v. Crawford*, 205 Ga. App. 887 (1992) required that set-offs of prior settlements with other joint tortfeasors had to be considered in determining if the demand had been equaled or exceeded for the imposition of pre-judgment interest such language is disapproved. *Sec. Life Ins. Co. v. St. Paul Marine & Fire Ins. Co.*, 263 Ga. App. 525, 588 S.E.2d 319 (2003).

**Lender was entitled to recover attorney's fees for action to reform note** that the lender erroneously marked as paid since the borrowers never disputed that the debt had not been paid in full. *Gibson v. Decatur Fed. Sav. & Loan Ass'n*, 235 Ga. App. 160, 508 S.E.2d 788 (1998).

**Award of fees and expenses not reversed.** — There was no basis to reverse the award of attorney's fees and expenses when at most the award could be construed to include an award for both fees and expenses during the lower court proceedings and the subsequent proceedings before the court and when the trial court sought to clarify any ambiguity in the award by stating that the award did not include fees and expenses arising out of the appeal. *Castro v. Cambridge Square Towne Houses, Inc.*, 204 Ga. App. 746, 420 S.E.2d 588, cert. denied, 204 Ga. App. 921, 420 S.E.2d 588 (1992).

Award of attorney's fees and expenses would not be reversed since there was evidence to support the trial court's ruling that the plaintiff failed to present a justiciable issue of law as required by subsection (a) of O.C.G.A. § 9-15-14 and that the trial court did not abuse the court's discretion in awarding fees under subsection (b). *Kinard v. Worldcom, Inc.*, 244 Ga. App. 614, 536 S.E.2d 536 (2000), overruled on other grounds, *Thompson v. Allstate Ins. Co.*, 285 Ga. 24, 673 S.E.2d 227 (Ga. 2009).

**Award mandatory when judgment encompasses grounds.** — When the trial court judgment is encompassed within the grounds for awarding such expenses, the award of attorney's fees and expenses of litigation is mandatory. *Fabe v. Floyd*, 199 Ga. App. 322, 405 S.E.2d 265,



cert. denied, 199 Ga. App. 906, 405 S.E.2d 265 (1991).

**Award of attorney's fees not justified when arguable support for action.** — County superintendent of election and winning candidates were not entitled to attorney's fees under O.C.G.A. § 9-15-14 since there was arguable support for the contestants' interpretation of the statute under which the contestants brought the action and the statute had not previously been interpreted by any court. *Ellis v. Johnson*, 263 Ga. 514, 435 S.E.2d 923 (1993).

In a domestic dispute over visitation rights, since the defendant's motion to dismiss asserted an arguably meritorious position, there was not a "complete absence of any justiciable issue of law or fact," and the trial court erred in awarding attorney's fees under subsection (a) of O.C.G.A. § 9-15-14. *Hall v. Hall*, 241 Ga. App. 690, 527 S.E.2d 288 (1999).

**Award of fees to third party defendant.** — In a suit when a mortgage company employee who was a third-party defendant was awarded attorney fees against a borrower, there was no merit to the borrower's argument that the employee should have filed a motion to sever instead of a motion to dismiss. This argument failed to take into account what actually occurred, which was that the borrower voluntarily dismissed the borrower's third-party complaint only after the employee filed a motion to dismiss, thereby retaining the option of refileing the complaint against the employee in a separate action and subjecting the employee to defending the same allegations twice. However, an evidentiary hearing on the award was required. *McCray v. Fannie Mae*, 292 Ga. App. 156, 663 S.E.2d 736 (2008).

**Sanctions justified.** — Nominal sanctions in an amount closely tied to the direct expenses incurred by the county and the defendant due to the plaintiffs' unnecessarily expanding the proceeding were justified. *Hill v. Doe*, 239 Ga. App. 869, 522 S.E.2d 471 (1999).

**Sanctions unjustified.** — When an attorney did not solely rely on the attorney's client's claims of insolvency, but required the client to verify the client's fi-

nancial situation with the attorney's accountant, and when there was no evidence that the attorney delayed the proceedings to accomplish diversion of the client's assets, sanctions imposed against the attorney could not stand. *Northern v. Mary Anne Frolick & Assocs.*, 236 Ga. App. 7, 510 S.E.2d 857 (1999).

**Children of incompetent ward were not entitled to recover costs and attorney's fees** from the guardian since the children had unsuccessfully moved to hold the guardian, who was the ward's second wife, in contempt for her alleged failure to comply with a property settlement agreement as there was no "complete absence" of a justiciable issue of law or fact concerning the guardian's defense. *Head v. Head*, 234 Ga. App. 469, 507 S.E.2d 214 (1998).

**Pro se parent seeking visitation modification not responsible for fees.** — Although a parent, who was acting pro se in prosecuting a petition to modify visitation, may have been slower than an attorney, this was not a finding which showed that the parent "unnecessarily expanded the proceeding by other improper conduct" as contemplated by O.C.G.A. § 9-15-14(b). *Moore v. Moore-McKinney*, 297 Ga. App. 703, 678 S.E.2d 152 (2009).

**Award of fees in child custody cases.** — Full amount of attorney's fees award of \$35,000 to a father in a child custody dispute was justified by the trial court's findings under either O.C.G.A. § 9-15-14 or O.C.G.A. § 19-9-3(g); therefore, the trial court was not required to allocate the amount the court was awarding under each statute. *Taylor v. Taylor*, 293 Ga. 615, 748 S.E.2d 873 (2013).

**Award proper in divorce action.** — Trial court's award of \$60,000 attorney's fees to a wife under O.C.G.A. § 9-15-14 was upheld based on the trial court's order, which recounted several instances of the husband's misconduct during the litigation and found that they caused numerous delays, extra motions, and extra conversations, and forced the wife's counsel to make multiple requests for documents and answers and to go to otherwise unnecessary efforts to obtain needed documents. The award was also proper under O.C.G.A. § 19-6-2(a)(1) to ensure effective



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representation of both spouses. *Miller v. Miller*, 288 Ga. 274, 705 S.E.2d 839 (2010).

**Improper to award attorney's fees for motion for new trial challenging factual findings.** — Trial court abused the court's discretion in awarding litigation-abusive attorney fees under O.C.G.A. § 9-15-14 in connection with a father's motion for a new trial challenging the factual findings of the trial court; the mother's contention that a motion for a new trial was not an available remedy in a custody court was not sustainable. *Eldridge v. Ireland*, 259 Ga. App. 44, 576 S.E.2d 44 (2002).

**Award unauthorized in lieu of inadequate proof of reasonableness of attorney's bill.** — In a couple's suit for the negligent construction of a swimming pool, the trial court abused the court's discretion by awarding the couple attorney fees, pursuant to O.C.G.A. § 9-15-14(b), against the contractor as the couple's counsel presented an inadequate time sheet that was merely a half-page summary of 49 hours spent by the attorney in various activities that were not detailed. The summary did not offer any further break down of the time expended by the attorney and the time sheet attached to the affidavit did not break down the time by hours expended nor provided any detailing regarding the activities conducted by the attorney. *Dave Lucas Co. v. Lewis*, 293 Ga. App. 288, 666 S.E.2d 576 (2008).

**Clerk of court liable for attorney's fees to litigant for failure to prepare and transmit record.** — Clerk of court was liable to a litigant for attorney's fees under O.C.G.A. § 9-15-14 based on the clerk's failure to prepare and transmit the record in the litigant's case to the appellate court as required by O.C.G.A. § 5-6-43 until six months after the record should have been prepared, and then only when the litigant filed a petition for mandamus, to which the clerk interposed meritless defenses. *Robinson v. Glass*, 302 Ga. App. 742, 691 S.E.2d 620 (2010).

**Award against county in employment case proper.** — Employee, a fire

chief whose termination was reversed by a hearing officer, was entitled to a writ of mandamus reinstating the employee to the employee's former position after the county refused to abide by the hearing officer's decision. The employee was also entitled to reasonable attorney fees and expenses of litigation under O.C.G.A. § 9-15-14(b). *Ellis v. Caldwell*, 290 Ga. 336, 720 S.E.2d 628 (2012).

**Airline expense not recoverable in a sanction award.** — In a child visitation dispute, a trial court erred by awarding the father \$1,468 for airline ticket expenses incurred as a result of the visitation dispute because that was not an expense of litigation recoverable in a sanction award pursuant to O.C.G.A. § 9-15-14(b). *Bankston v. Warbington*, 319 Ga. App. 821, 738 S.E.2d 656 (2013).

**Award nondischargeable in bankruptcy.** — Award of attorney's fees to a Chapter 7 debtor's former spouse under Georgia's abusive litigation provision was nondischargeable since the award was made by the state court directly to the former spouse and the award was in connection with defending the former spouse's rights under the divorce decree. It made no difference that it was the debtor who initiated the proceedings that led to the award. *Howerton v. Howerton (In re Howerton)*, No. 12-01055, 2013 Bankr. LEXIS 2993 (Bankr. N.D. Ga. July 19, 2013).

**Appeals**

**"Court of record."** — Court of appeals is not a "court of record" within the meaning of O.C.G.A. § 9-15-14. *Style Craft Homes, Inc. v. Chapman*, 226 Ga. App. 634, 487 S.E.2d 32 (1997).

**Trial court lacks authority to award fees and expenses in appellate proceedings.** — Trial court does not have authority, pursuant to O.C.G.A. § 9-15-14, to require the payment of reasonable and necessary attorney's fees and expenses of litigation for proceedings before an appellate court of this state. *DOT v. Franco's Pizza & Delicatessen, Inc.*, 200 Ga. App. 723, 409 S.E.2d 281, cert. denied, 200 Ga. App. 895, 409 S.E.2d 281 (1991), overruled on other grounds, 264 Ga. 393,



444 S.E.2d 734 (1994); *Bankhead v. Moss*, 210 Ga. App. 508, 436 S.E.2d 723 (1993).

O.C.G.A. § 9-15-14 provides no authority pursuant to which a trial court can award attorney's fees and expenses of litigation for proceedings before appellate courts. *Castro v. Cambridge Square Towne Houses, Inc.*, 204 Ga. App. 746, 420 S.E.2d 588, cert. denied, 204 Ga. App. 921, 420 S.E.2d 588 (1992); *Fulton County Tax Comm'r v. GMC*, 234 Ga. App. 459, 507 S.E.2d 772 (1998).

**Trial court lacks authority to award fees and expenses in appellate proceedings.** — O.C.G.A. § 9-15-14 does not authorize an award for the expenses of litigation incurred during proceedings before an appellate court of this state. *Harkleroad v. Stringer*, 231 Ga. App. 464, 499 S.E.2d 379 (1998).

**Direct appeal from an award of attorney fees under O.C.G.A. § 9-15-14** was not properly before the Court of Appeals after the directly appealable judgment was dismissed. *Roberts v. Pearce*, 232 Ga. App. 417, 501 S.E.2d 555 (1998); *Burns v. Howard*, 239 Ga. App. 315, 520 S.E.2d 491 (1999).

**Appellate review of awards.** — When reviewing awards under O.C.G.A. § 9-15-14(b), trial judges have broad discretion in controlling discovery, including imposition of sanctions; hence, the appellate courts will not reverse a trial court's decision on such matters absent a clear abuse of discretion. *Doe v. HGI Realty, Inc.*, 254 Ga. App. 181, 561 S.E.2d 450 (2002).

Because a grandparent was not aggrieved by an attorney-fee award entered pursuant to O.C.G.A. § 9-15-14(b), that grandparent lacked standing to appeal the award and the appeals court lacked jurisdiction to address the award. In the *Interest of J.R.P.*, 287 Ga. App. 621, 652 S.E.2d 206 (2007), cert. denied, 2008 Ga. LEXIS 207 (Ga. 2008).

When a developer argued that the trial court improperly awarded attorney fees under O.C.G.A. § 9-15-14(a), but the award was also made under § 9-15-14(b), and the developer did not contest the latter award specifically, the award could be sustained on independent grounds and addressing the error raised would be

purely advisory. *Prime Home Props., LLC v. Rockdale County Bd. of Health*, 290 Ga. App. 698, 660 S.E.2d 44 (2008), cert. denied, No. S08C1330, 2008 Ga. LEXIS 685 (Ga. 2008).

**When application to appeal award required.** — Effective July 1, 1986, O.C.G.A. § 5-6-35 was amended to require applications to appeal awards of attorney's fees or expenses of litigation under O.C.G.A. § 9-15-14, and a direct appeal will be dismissed for failure to comply with that statute. *Martin v. Outz*, 257 Ga. 211, 357 S.E.2d 91 (1987); *Bowles v. Lovett*, 190 Ga. App. 650, 379 S.E.2d 805 (1989).

**When application for appeal not required.** — Judgment awarding attorney's fees and costs of litigation pursuant to O.C.G.A. § 9-15-14 may be reviewed on direct appeal, when it is appealed as part of a judgment that is directly appealable. The application required by O.C.G.A. § 5-6-35 need not be filed on the separate costs and fees issue. *Haggard v. Board of Regents*, 257 Ga. 524, 360 S.E.2d 566 (1987); *Mitcham v. Blalock*, 268 Ga. 644, 491 S.E.2d 782 (1997).

Appeals from awards of attorney fees or expenses of litigation under O.C.G.A. § 9-15-14 require application for appellate review. Lacking such an application, the appellate court is without jurisdiction to entertain the appeal and the appeal must be dismissed. *Loveless v. Pickering*, 187 Ga. App. 49, 369 S.E.2d 281, cert. denied, 187 Ga. App. 908, 369 S.E.2d 281 (1988); *Morris v. Morris*, 226 Ga. App. 799, 487 S.E.2d 528 (1997).

When the appellee city sought to dismiss the appellant's appeal from the award of attorney's fees because the appellant did not file an application as required by subsection (a)(10) of O.C.G.A. § 9-15-14 for an appeal from an award of attorney's fees pursuant to that section, an application was not necessary to appeal the award of attorney's fees since this was appealed along with other matters directly appealable. *Stancil v. Gwinnett County*, 259 Ga. 507, 384 S.E.2d 666 (1989).

When a debtor paid a promissory note and demanded that the creditor record the note's satisfaction, but the creditor sued



**Appeals (Cont'd)**

the debtor on the note four years later, a trial court properly found the debtor was entitled to an award of attorney fees under O.C.G.A. § 9-15-14(b); however, the trial court did not adequately explain how the court arrived at the amount the court awarded and, because the court had ruled against the debtor on some of the counterclaims against the creditor and therefore those counterclaims could not serve as the basis for an award of attorney fees, it was necessary to remand the matter to the trial court for further findings. *Franklin Credit Mgmt. Corp. v. Friedenbergs*, 275 Ga. App. 236, 620 S.E.2d 463 (2005).

In a dispute between a creditor and a debtor over the enforcement of a settlement agreement, the trial court's award of attorney fees to the creditor for fees incurred in enforcing the settlement was not supported by any findings required under O.C.G.A. § 9-15-14(a) or (b), so this issue had to be remanded for such findings. *DeRossett Enters. v. GE Capital Corp.*, 275 Ga. App. 728, 621 S.E.2d 755 (2005).

Litigator was subject to a trial court's commands and sanctions concerning litigation in which the litigator had been involved, whether or not the litigator or the firm had already withdrawn at the time of a finding under O.C.G.A. § 9-15-14; award of attorneys fees against a law firm for a frivolous lawsuit was supported by sufficient findings that the law firm had notice of both the plaintiff's intention to seek fees and the hearing at which fees were assessed. *Andrew, Merritt, Reilly & Smith, LLP v. Remote Accounting Solutions, Inc.*, 277 Ga. App. 245, 626 S.E.2d 204 (2006).

Award of attorney fees or expenses of litigation made pursuant to O.C.G.A. § 9-15-14 could be appealed without filing the application for discretionary review required by O.C.G.A. § 5-6-35(a)(10) when the underlying judgment in the case is pending. *Avren v. Garten*, 289 Ga. 186, 710 S.E.2d 130 (2011).

**Attorney fees properly awarded following dismissal.** — Trial court properly awarded attorney fees and expenses to a welder for the costs spent defending against frivolous claims raised in an in-

jured party's original suit, which had been voluntarily dismissed; as the injured party properly renewed the suit, the deadline for filing the attorney fee motion on the original suit did not begin to run until the final disposition of the renewed suit. *Trotter v. Summerour*, 273 Ga. App. 263, 614 S.E.2d 887 (2005).

Since, in the context of a contempt matter brought against the client, a husband's attorney was never given proper notice of the possibility that the attorney fees hearing could have resulted in an award against the attorney pursuant to O.C.G.A. § 9-15-14(b), the award was improper; a claim for attorney fees under O.C.G.A. § 19-6-2 was not considered a realistic opportunity to contest the need for legal services forming the basis of an O.C.G.A. § 9-15-14(b) award because the basis for an award of fees under the two statutes was different. *Williams v. Cooper*, 280 Ga. 145, 625 S.E.2d 754 (2006).

**No issue on appeal when section not invoked.** — Absent indication that the appellee ever invoked O.C.G.A. § 9-15-14 or that the trial court ever granted attorney's fees to the appellee under that section, no issue concerning the appellee's recovery of attorney's fees under that section was presented for review. *Covington v. Countryside Inv. Co.*, 263 Ga. 125, 428 S.E.2d 562 (1993).

**Procedure for appeal.** — Party aggrieved by a post-judgment award under O.C.G.A. § 9-15-14 is required to comply with the discretionary appeal procedure of O.C.G.A. § 5-6-35 only in those instances when no direct appeal has been otherwise taken from the underlying judgment. However, in those instances when a direct appeal has been taken from the underlying judgment, a party may also appeal directly from the post-judgment award under § 9-15-14 without regard to the discretionary appeal procedures of § 5-6-35. *Rolleston v. Huie*, 198 Ga. App. 49, 400 S.E.2d 349 (1990), cert. denied, 198 Ga. App. 898, 400 S.E.2d 349 (1991).

**Appeal from an award of expenses of litigation** under O.C.G.A. § 9-15-14 is discretionary when not appealed as part of a judgment that is directly appealable. *Cheeley-Towns v. Rapid Group, Inc.*, 212 Ga. App. 183, 441 S.E.2d 452 (1994).



When a debtor paid a promissory note and demanded that the creditor record the note's satisfaction, but the creditor sued the debtor on the note four years later, it was not an abuse of discretion for a trial court to find that the debtor was entitled to an award of attorney fees under O.C.G.A. § 9-15-14(b) as the creditor's only defense to the creditor's liability to the debtor, under O.C.G.A. § 44-14-3(c), was a clearly meritless argument that the notice requirements of O.C.G.A. § 44-14-3(c.1) applied; § 44-14-3(c) specifically provided that no other section of § 44-14-3 was to be construed to limit the liquidated damages a creditor owed a debtor for violating § 44-14-3(c) and, thus, the creditor's argument lacked substantial justification. *Franklin Credit Mgmt. Corp. v. Friedenbergs*, 275 Ga. App. 236, 620 S.E.2d 463 (2005).

Trial court erred in a breach of contract case by failing to set forth any findings of fact, conclusions of law, or the statutory subsection to support an award of attorneys fees and costs granted to an asphalt company in the amount of \$600,000 as a result of the company successfully moving to exclude evidence under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. § 24-7-702). The trial court's two page order merely reciting the company's successful motion was too vague and conclusionary to permit any meaningful appellate review of the award of attorney fees and expenses of litigation under O.C.G.A. § 9-15-14. *Ga. Dep't of Transp. v. Douglas Asphalt Co.*, 295 Ga. App. 421, 671 S.E.2d 899 (2009).

**Post-judgment motions for fees does not toll time to appeal from final judgment.** — Supreme court was without jurisdiction to review the propriety or substance of the trial court's order denying the property owners' motion for new trial because the owners failed to timely file a notice of appeal in regard to that order and the builders' post-judgment motions for fees under O.C.G.A. §§ 9-11-68 and 9-15-14 did not toll the time for the owners' to appeal from the order denying the owners' motion for new trial; the trial court entered a final judgment on October 4, 2007, and the owners' filing of a motion for new trial tolled the time for appeal

under O.C.G.A. § 5-6-38(a), but as soon as the trial court issued the court's order disposing of the motion for new trial, the thirty-day time period to file a notice of appeal began to run, and the owners' filed the motion for new trial on March 9, 2009. *O'Leary v. Whitehall Constr.*, 288 Ga. 790, 708 S.E.2d 353 (2011).

**Standards of review.** — Because an award of attorney's fees and expenses of litigation is mandatory under subsection (a) of O.C.G.A. § 9-15-14, the standard of review by an appellate court is the "any evidence" rule. *Haggard v. Board of Regents*, 257 Ga. 524, 360 S.E.2d 566 (1987).

Because an award of attorney's fees and expenses of litigation is discretionary under subsection (b) of O.C.G.A. § 9-15-14, the standard of review by an appellate court is whether the lower court abused the court's discretion in making the award. *Haggard v. Board of Regents*, 257 Ga. 524, 360 S.E.2d 566 (1987); *Atlanta Propeller Serv., Inc. v. Hoffman GMBH & Co.*, 191 Ga. App. 529, 382 S.E.2d 109, cert. denied, 191 Ga. App. 921, 382 S.E.2d 109 (1989).

In determining whether a trial court erroneously assessed attorney's fees under subsection (b) of O.C.G.A. § 9-15-14, the standard of review is an "abuse of discretion." *Griffiths v. Phenix Supply Co.*, 192 Ga. App. 651, 385 S.E.2d 789 (1989).

Award of attorney's fees pursuant to subsection (b) of O.C.G.A. § 9-15-14 is discretionary and the standard of review is an abuse of discretion. *Haywood v. Aerospec, Inc.*, 193 Ga. App. 479, 388 S.E.2d 367, cert. denied, 193 Ga. App. 910, 388 S.E.2d 367 (1989).

Standard of review for motions under subsection (a) of O.C.G.A. § 9-15-14 is the "any evidence" rule, and the standard of review for motions under subsection (b) of § 9-15-14 is the "abuse of discretion" rule. *Gibson v. Southern Gen. Ins. Co.*, 199 Ga. App. 776, 406 S.E.2d 121 (1991).

Standard of review for awards of attorney's fees and expenses of litigation is the "any evidence" standard. *Covrig v. Miller*, 199 Ga. App. 864, 406 S.E.2d 239 (1991).

**Authority of superior court sitting in appellate capacity.** — O.C.G.A. § 9-15-14 authorizes a superior court to assess attorney's fees against a party or



**Appeals (Cont'd)**

that party's counsel who has prosecuted a frivolous appeal from a workers' compensation award of the Administrative Law Judge or the full board in the superior court. *Contract Harvesters v. Clark*, 211 Ga. App. 297, 439 S.E.2d 30 (1993); *Vulcan Materials Co. v. Pritchett*, 227 Ga. App. 530, 489 S.E.2d 558 (1997).

O.C.G.A. § 9-15-14 provided authority for the imposition of sanctions for an appeal to the superior court in a proceeding which resulted in no money award. *Osofsky v. Board of Mayor & Comm'rs*, 237 Ga. App. 404, 515 S.E.2d 413 (1998).

**Arbitration of attorney's fees incurred on appeal.** — Contractor, who successfully defended an arbitration award on appeal, was not limited to then seeking attorney's fees for frivolous litigation before the trial court pursuant to O.C.G.A. § 9-15-14 but could submit the appellate fee dispute to arbitration as the issue of attorney's fees was governed by the arbitration provision in a contract between the contractor and a county. *Yates Paving & Grading Co. v. Bryan County*, 265 Ga. App. 578, 594 S.E.2d 756 (2004).

**Review of merits prohibited.** — Court of Appeals would not address the merits of the appellee's motion for attorney's fees under O.C.G.A. § 9-15-14 for such a motion properly addresses itself to the trial court for disposition. *Chrysler Corp. v. Marinari*, 182 Ga. App. 399, 355 S.E.2d 719 (1987).

Trial court properly awarded attorney fees and expenses to a welder as an injured party failed to show that the injured party was justified in seeking punitive damages or attorney fees based on a difficult welding job and the case did not involve special circumstances of aggravation or outrage; further, the injured party failed to show that the party had information that led the party to believe that the party was entitled to punitive damages or attorney fees. *Trotter v. Summerour*, 273 Ga. App. 263, 614 S.E.2d 887 (2005).

**Award of attorney fees in client's claim against real estate broker was appropriate.** — When a business broker's client sought attorney fees against

the broker, under O.C.G.A. § 9-15-14(b), after the broker sued the client for a commission, such an award was proper because many of the broker's claims lacked substantial justification as only five of the 16 counts filed survived for submission to the jury as many were duplicative or lacked any basis in law or fact, and the broker's counsel engaged in improper conduct which unnecessarily expanded the proceeding. *Bienert v. Dickerson*, 276 Ga. App. 621, 624 S.E.2d 245 (2005).

**Improper service.** — Although a former employer failed to properly serve papers, including a summary judgment motion, on the former employee's counsel at counsel's new address, despite a change of address having been provided, pursuant to Ga. Ct. App. R. 1(a) and Ga. Ct. App. R. 6, the appellate court denied the employee's motion to dismiss the appeal and, instead, the court reviewed the matter on the merits; the improper service was asserted as a ground for an award of attorney fees, pursuant to O.C.G.A. § 9-15-14, and such award would be subject to appellate review under O.C.G.A. § 5-6-35(a)(10). *Whimsical Expressions, Inc. v. Brown*, 275 Ga. App. 420, 620 S.E.2d 635 (2005).

**Appeal did not address attorney's fee award.** — Defendant's challenge of award of attorney's fees to plaintiff based on the frivolous nature of the defendant's adverse possession defense to an ejectment action was not properly before the court of appeals because the defendant's appeal was from the dismissal of the defendant's prior appeal rather than from the underlying claim. *Boveland v. YWCA*, 227 Ga. App. 241, 489 S.E.2d 35 (1997).

**Decision on discretionary appeal had res judicata effect.** — As property owners' application for a discretionary appeal as to the trial court's order that awarded a business entity attorney fees was previously denied, that decision was res judicata with respect to the issue of the fees; accordingly, the owners could not seek a second review by appealing the award of fees. *Elrod v. Sunflower Meadows Dev., LLC*, 322 Ga. App. 666, 745 S.E.2d 846 (2013).

**Appeal from order awarding sanction.** — Order imposing a monetary sanc-



tion for wilfully failing to attend a scheduled post-judgment deposition was in the nature of an award for frivolous litigation and required an application for discretionary appeal. *Bonnell v. Amtex, Inc.*, 217 Ga. App. 378, 457 S.E.2d 590 (1995).

Order imposing a sanction for unnecessarily expanding a proceeding was in the nature of an award for frivolous litigation within the purview of subsection (b) of O.C.G.A. § 9-15-14 and, as such, was not directly appealable, but required an appli-

cation pursuant to discretionary appeal procedures. *Hill v. Doe*, 239 Ga. App. 869, 522 S.E.2d 471 (1999).

**Award reviewable on direct appeal.** — Award of attorney fees under both subsections (a) and (b) of O.C.G.A. § 9-15-14 was reviewable on direct appeal along with a judgment under O.C.G.A. § 51-7-83, relating to the measure of damages for abusive litigation. *Hallman v. Emory Univ.*, 225 Ga. App. 247, 483 S.E.2d 362 (1997).

RESEARCH REFERENCES

**ALR.** — Attorney’s fees: obduracy as basis for state-court award, 49 ALR4th 825.

Attorneys’ fees: cost of services provided by paralegals or the like as compensable

element of award in state court, 73 ALR4th 938.

Validity, construction, and application of state vexatious litigant statutes, 45 ALR6th 493.

**9-15-15. Attorney’s fees and expenses assessed in civil actions brought against judicial officers.**

(a) When any civil action is brought against a judicial officer, other than an action for quo warranto, mandamus, or an action brought under Title 42, Section 1983 of the United States Code, and such action arises out of the performance of the judicial officer’s official duties, the plaintiff shall be liable for all attorney’s fees and expenses incurred in the defense of the action if the action is concluded in favor of the judicial officer, and the court finds that an attorney or party brought an action that lacked substantial justification or that the action, or any part of the action, was interposed for delay or harassment. As used in this Code section, “lacked substantial justification” means substantially frivolous, substantially groundless, or substantially vexatious. For purposes of this Code section, judicial officers shall include justices and judges of the appellate courts of Georgia and judges of the superior, state, probate, juvenile, magistrate, and municipal courts.

(b) The provisions of subsection (a) of this Code section shall apply both with respect to actions brought against a judicial officer in his or her official capacity and with respect to actions brought against a judicial officer in his or her individual capacity where the action arises out of the performance of the judicial officer’s official duties.

(c) Recovery may be had under subsection (a) of this Code section by the state or by a unit of local government with respect to attorney’s fees and expenses incurred by the state or by the unit of local government. Where recovery by a governmental unit is so authorized, recovery shall be authorized for attorney’s fees paid to outside counsel as well as for



compensation paid to counsel employed by the governmental unit. Recovery may also be had under subsection (a) of this Code section with respect to attorney's fees and expenses personally incurred by a judicial officer. Recovery under subsection (a) of this Code section shall include any attorney's fees and expenses incurred in appellate proceedings arising out of an action subject to this Code section.

(d) When a civil action against a judicial officer, other than an action for quo warranto, mandamus, or an action brought under Title 42, Section 1983 of the United States Code, which action arises out of the performance of the judicial officer's official duties is presented for filing, the clerk of court shall file the matter but shall present the complaint or other initial pleading to the district court administrator for the judicial circuit where the action was filed, to assign to a superior court judge of that circuit. If the action is filed against a judge or justice of an appellate court, the chief judge or justice shall assign the matter to a member of that court. The judge shall review the pleading, and, if the judge determines that the pleading shows on its face such a complete absence of any justiciable issue of law or fact that it cannot be reasonably believed that the court could grant any relief against any party named in the pleading, then the judge shall enter an order dismissing the pleading. An order dismissing the pleading shall be appealable in the same manner as an order dismissing an action.

(e) Attorney's fees and expenses under this Code section may be requested by motion at any time during the course of the action but not later than 45 days after the final disposition of the action.

(f) An award of reasonable and necessary attorney's fees or expenses of litigation under this Code section shall be determined by the court without a jury and shall be made by an order of court which shall constitute and be enforceable as a money judgment. (Code 1981, § 9-15-15, enacted by Ga. L. 1998, p. 862, § 3; Ga. L. 1999, p. 81, § 9.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1998, "justices and judges" was substituted for "Justices and Judges" in the last sentence of subsection (a), and "judge or justice" was substi-

tuted for "Judge or Justice" in two places in the second sentence of subsection (d).

**Law reviews.** — For review of 1998 legislation relating to civil practice, see 15 Ga. St. U.L. Rev. 1 (1998).



CHAPTER 16

UNIFORM CIVIL FORFEITURE PROCEDURE ACT

Sec.		Sec.	
9-16-1.	Short title.	9-16-15.	Stay of civil forfeiture proceedings during pendency of criminal proceedings; effect of criminal conviction.
9-16-2.	Definitions.	9-16-16.	Recovery by an injured person.
9-16-3.	Jurisdiction.	9-16-17.	Burden of proof and presumptions.
9-16-4.	Venue.	9-16-18.	Forfeited property vests in state at time conduct giving rise to forfeiture committed; release of property upon entry of judgment in favor of owner.
9-16-5.	Notice to innocent owner of seizure of vehicle.	9-16-19.	Disposition of forfeited property; order of distribution; annual report.
9-16-6.	Seizure of property.	9-16-20.	Court may order forfeiture of other property under certain circumstances; civil action; enforcement of judgments; persons having interest in property barred from collaterally attacking forfeiture proceedings; limitations.
9-16-7.	Reporting of seizure; role of state attorney.	9-16-21.	Effect of federal law forfeitures; annual report.
9-16-8.	Forfeiture lien.	9-16-22.	Construction.
9-16-9.	Seized property not subject to replevin, conveyance, sequestration, or attachment; release of property; assignment of complaint for forfeiture; custodian of property.		
9-16-10.	Disposition of seized property.		
9-16-11.	Administrative forfeiture for property valued at \$25,000.00 or less; notice; procedure.		
9-16-12.	In rem forfeiture.		
9-16-13.	In personam forfeiture.		
9-16-14.	Restraining order, injunction, and other measures to seize, maintain, or preserve property; hearing.		

**Effective date.** — This chapter became effective July 1, 2015.

**Editor’s notes.** — Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure.”

In light of the enactment of this Chapter, effective July 1, 2015, the reader is advised to consult the annotations following Code Sections 16-6-13.3, 16-12-30, 16-12-32, 16-13-32, 16-13-49, 16-14-7, 16-14-14, 16-16-2, 17-5-51, 17-5-54, and 40-6-391.2, as they existed on June 30, 2015, which may also be applicable to this Code section.

9-16-1. Short title.

This chapter shall be known and may be cited as the “Georgia Uniform Civil Forfeiture Procedure Act.” (Code 1981, § 9-16-1, enacted by Ga. L. 2015, p. 693, § 1-1/HB 233.)



**9-16-2. Definitions.**

As used in this chapter, the term:

(1)(A) “Beneficial interest” means either of the following:

(i) The interest of a person as a beneficiary under any written trust arrangement pursuant to which a trustee holds legal or record title to real property for the benefit of such person; or

(ii) The interest of a person under any other written form of express fiduciary arrangement pursuant to which any other person holds legal or record title to real property for the benefit of such person.

(B) Such term shall not include the interest of a stockholder in a corporation, the interest of a partner in either a general partnership or limited partnership, or an equitable interest.

(2) “Civil forfeiture proceeding” means a quasi-judicial forfeiture initiated pursuant to Code Section 9-16-11 or a complaint for forfeiture initiated pursuant to Code Section 9-16-12 or 9-16-13.

(3) “Costs” means, but shall not be limited to:

(A) All expenses associated with the seizure, towing, storage, maintenance, custody, preservation, operation, or sale of property; and

(B) Satisfaction of any security interest or lien not subject to forfeiture under this chapter.

(4) “Court costs” means, but shall not be limited to:

(A) Charges and fees taxed by the court, including filing, transcription, and court reporter fees, and advertisement costs; and

(B) Payment of receivers, conservators, appraisers, accountants, or trustees appointed by the court pursuant to Code Section 9-16-10 or 9-16-14.

(5) “Financial institution” means a bank, trust company, national banking association, industrial bank, savings institution, or credit union chartered and supervised under state or federal law.

(6) “Governmental agency” means any department, office, council, commission, committee, authority, board, bureau, or division of the executive, judicial, or legislative branch of a state, the United States, or any political subdivision thereof.

(7) “Interest holder” means a secured party within the meaning of Code Section 11-9-102, the claim of a beneficial interest, or a perfected encumbrance pertaining to an interest in property.



(8) “Owner” means a person, other than an interest holder, who has an interest in property and is in compliance with any statute requiring its recordation or reflection in public records in order to perfect the interest against a bona fide purchaser for value.

(9) “Proceeds” means property derived directly or indirectly from, maintained by, or realized through an act or omission relating to criminal conduct and includes any benefit, interest, or property of any kind without reduction for expenses incurred for acquisition, maintenance, or any other purpose.

(10) “Property” means anything of value and includes any interest in anything of value, including real property and any fixtures thereon, and tangible and intangible personal property, including but not limited to currency, instruments, securities, or any other kind of privilege, interest, claim, or right.

(11) “Real property” means any real property situated in this state or any interest in such real property, including, but not limited to, any lease of or mortgage upon such real property.

(12) “State attorney” means a district attorney of this state or his or her designee or, when specifically authorized by law, the Attorney General or his or her designee.

(13)(A) “Trustee” means either of the following:

(i) Any person who holds legal or record title to real property for which any other person has a beneficial interest; or

(ii) Any successor trustee or trustees to any of the foregoing persons.

(B) Such term shall not include the following:

(i) Any person appointed or acting as:

(I) A guardian, conservator, or personal representative under Title 29 or Chapters 1 through 11 of Title 53, the “Revised Probate Code of 1998”; or

(II) A personal representative under former Chapter 6 of Title 53 as such existed on December 31, 1997; or

(ii) Any person appointed or acting as a trustee of any testamentary trust or as trustee of any indenture of trust under which any bonds are issued.

(14) “United States” means the United States and its territories and possessions, the 50 states, and the District of Columbia. (Code 1981, § 9-16-2, enacted by Ga. L. 2015, p. 693, § 1-1/HB 233.)



**9-16-3. Jurisdiction.**

(a) A civil forfeiture proceeding shall be filed by a state attorney in the name of the State of Georgia in any superior court of this state and may be brought:

(1) In the case of an in rem action, in the judicial circuit where the property is located;

(2) In the case of an in personam action, in the judicial circuit in which the defendant resides; or

(3) By the state attorney having jurisdiction over any offense which arose out of the same conduct which made the property subject to forfeiture.

(b) If more than one state attorney has jurisdiction to file a civil forfeiture proceeding, the state attorney having primary jurisdiction over the conduct giving rise to the forfeiture shall, in the event of a conflict, have priority over any other state attorney.

(c) A civil forfeiture proceeding may be compromised or settled in the same manner as other civil actions. (Code 1981, § 9-16-3, enacted by Ga. L. 2015, p. 693, § 1-1/HB 233.)

**9-16-4. Venue.**

A complaint for forfeiture pursuant to Code Section 9-16-12 or 9-16-13 shall be tried:

(1) If the complaint for forfeiture is in rem against real property, in the county where the property is located, except where a single tract is divided by a county line, in which case the superior court of either county shall have jurisdiction;

(2) If the complaint for forfeiture is in rem against tangible or intangible personal property, in any county where the property is located or will be located during the pendency of the action; or

(3) If the complaint for forfeiture is in personam, as provided in Article VI, Section II of the Constitution. (Code 1981, § 9-16-4, enacted by Ga. L. 2015, p. 693, § 1-1/HB 233.)

**9-16-5. Notice to innocent owner of seizure of vehicle.**

If a seized vehicle is registered to a person or entity that was not present at the scene of the seizure and whose conduct did not give rise to the seizure, the seizing officer or his or her designee shall make a reasonable effort to determine the name of the registered owner of the seized vehicle and, upon learning such registered owner's telephone



number or address, inform such registered owner that the vehicle has been seized. (Code 1981, § 9-16-5, enacted by Ga. L. 2015, p. 693, § 1-1/HB 233.)

### **9-16-6. Seizure of property.**

(a) Property subject to forfeiture may be seized by any law enforcement officer of this state or any political subdivision thereof who has power to make arrests or execute process or a search warrant issued by any court having jurisdiction over the property. A court issued warrant authorizing seizure of property subject to forfeiture may be issued on an affidavit demonstrating that probable cause exists for its forfeiture or that the property has been the subject of a previous final judgment of forfeiture in the courts of the United States. The court may order that the property be seized on such terms and conditions as are reasonable.

(b) Property subject to forfeiture may be seized without process if probable cause exists to believe that the property is subject to forfeiture or the seizure is incident to an arrest or search pursuant to a search warrant or to an inspection under an inspection warrant.

(c) The court's jurisdiction over any civil forfeiture proceeding shall not be affected by a seizure in violation of the Constitution of Georgia or the Constitution of the United States made with process or in a good faith belief of probable cause. (Code 1981, § 9-16-6, enacted by Ga. L. 2015, p. 693, § 1-1/HB 233.)

### **9-16-7. Reporting of seizure; role of state attorney.**

(a) When property that is intended to be forfeited is taken by any law enforcement officer of this state, within 30 days thereof the seizing officer shall, in writing, report the fact of seizure and conduct an inventory and estimate the value of the property seized and provide such information to the district attorney of the judicial circuit having jurisdiction in the county where the seizure was made.

(b) Within 60 days from the date of seizure, the state attorney shall:

(1) Initiate a quasi-judicial forfeiture as provided for in Code Section 9-16-11; or

(2) File a complaint for forfeiture as provided for in Code Section 9-16-12 or 9-16-13.

(c) If the seizing officer fails to comply with subsection (a) of this Code section or the state attorney fails to comply with subsection (b) of this Code section, the property shall be released on the request of an owner or interest holder, pending a complaint for forfeiture pursuant to Code Section 9-16-12 or 9-16-13, unless the property is being held as



evidence. When the court releases property pursuant to this subsection, upon application by the state attorney, it may impose conditions as specified in paragraph (1) of Code Section 9-16-14. (Code 1981, § 9-16-7, enacted by Ga. L. 2015, p. 693, § 1-1/HB 233.)

### **9-16-8. Forfeiture lien.**

(a) A state attorney may file, without a filing fee, a forfeiture lien upon the initiation of any civil forfeiture proceeding or criminal proceeding or upon seizure for forfeiture. The forfeiture lien filing shall constitute notice to any person claiming an interest in the property owned by the named person. The forfeiture lien shall include the following information:

(1) The name of each person who has a known interest in the seized property and, in the discretion of the state attorney, any alias and any corporations, partnerships, trusts, or other entities, including nominees, that are either owned entirely or in part or controlled by such persons; and

(2) A description of the property, the value of the property claimed by the state attorney, the name of the court where the civil forfeiture proceeding or criminal proceeding has been brought, and the case number of the civil forfeiture proceeding or criminal proceeding if known at the time of filing the forfeiture lien.

(b) A forfeiture lien filed pursuant to this Code section shall apply to:

(1) The described property;

(2) Each named person and any aliases, fictitious names, or other names, including names of corporations, partnerships, trusts, or other entities that are either owned entirely or in part or controlled by each named person; and

(3) Any interest in real property owned or controlled by each named person.

(c) A forfeiture lien creates, upon filing, a lien in favor of the state as it relates to the seized property or to any named person or related entities with respect to such property. Such forfeiture lien secures the amount of potential liability for civil judgment and, if applicable, the fair market value of seized property relating to any civil forfeiture proceeding enforcing such lien. A forfeiture lien referred to in this Code section shall be filed in accordance with the provisions of the laws in this state pertaining to the type of property that is subject to the forfeiture lien. The state attorney may amend or release, in whole or in part, a forfeiture lien filed under this Code section at any time by filing, without a filing fee, an amended forfeiture lien in accordance with this



Code section which identifies the forfeiture lien amended. The state attorney, as soon as practical after filing a forfeiture lien, shall furnish to any person named in the forfeiture lien a notice of the filing of the forfeiture lien. Failure to furnish such notice shall not invalidate or otherwise affect a forfeiture lien filed in accordance with this Code section.

(d) Upon entry of judgment in favor of the state, the state attorney may proceed to execute on the forfeiture lien as in the case of any other judgment.

(e) A trustee, constructive or otherwise, who has notice that a forfeiture lien, a notice of pending forfeiture, or a complaint for forfeiture has been filed against the property or against any person or entity for whom the person holds title or appears as the owner of record shall furnish, within ten days of receiving notice as provided by this subsection, to the state attorney the following information:

(1) The name and address of the person or entity for whom the property is held;

(2) The names and addresses of all beneficiaries for whose benefit legal title to the seized property, or property of the named person or related entity, is held; and

(3) A copy of the applicable trust agreement or other instrument, if any, under which the trustee or other person holds legal title or appears as the owner of record of the property.

(f) A trustee, constructive or otherwise, who fails to comply with subsection (e) of this Code section shall be guilty of a misdemeanor. (Code 1981, § 9-16-8, enacted by Ga. L. 2015, p. 693, § 1-1/HB 233.)

**9-16-9. Seized property not subject to replevin, conveyance, sequestration, or attachment; release of property; assignment of complaint for forfeiture; custodian of property.**

(a) Property attached or seized under this chapter shall not be subject to replevin, conveyance, sequestration, or attachment.

(b) The seizing law enforcement agency or the state attorney may authorize the release of the attached or seized property if the forfeiture or retention is unnecessary or may transfer the civil forfeiture proceeding to another agency or state attorney by discontinuing such proceeding in favor of a civil forfeiture proceeding initiated by another law enforcement agency or state attorney.

(c) A complaint for forfeiture pursuant to Code Section 9-16-12 or 9-16-13 may be assigned to the same judge hearing any other complaint



for forfeiture or criminal proceeding involving substantially the same parties or same property in accordance with the Uniform Superior Court Rules.

(d) Property shall be deemed to be in the custody of the State of Georgia subject only to the orders and decrees of the superior court having jurisdiction over the civil forfeiture proceeding. (Code 1981, § 9-16-9, enacted by Ga. L. 2015, p. 693, § 1-1/HB 233.)

#### **9-16-10. Disposition of seized property.**

(a) If property is seized, the state attorney may:

(1) Remove the property to a place designated by the superior court having jurisdiction over a civil forfeiture proceeding;

(2) Place the property under constructive seizure by giving notice of pending forfeiture to its owners and interest holders and filing notice of seizure in any appropriate public record relating to the property. Notice of a pending forfeiture may be posted in a prominent location in the courthouse for the jurisdiction having venue for the forfeiture if the owners' and interest holders' names are not known;

(3) Remove the property to a storage area within the jurisdiction of the court for safekeeping;

(4) Provide for another governmental agency, a receiver appointed by the court pursuant to Chapter 8 of this title, an owner, or an interest holder to take custody of the property and remove it to an appropriate location within the county where the property was seized; or

(5) Require the sheriff or chief of police of the political subdivision where the property was seized to take custody of the property and remove it to an appropriate location for disposition in accordance with law.

(b)(1) The court, upon motion of the state attorney, a claimant, or the custodian of the property, may order property or any portion thereof to be sold upon such terms and conditions as may be prescribed by the court if the expense of keeping such property which has been attached or seized is excessive or disproportionate to the value of such property or such property:

(A) Is a depreciating asset;

(B) Is perishable or is liable to perish or waste; or

(C) May be greatly reduced in value by keeping it.

(2) The income from such sale shall be paid into the registry of the court pending final disposition of a civil forfeiture proceeding.



(c)(1) If the property is currency and is not needed for evidentiary purposes, within 60 days of the seizure the seizing agency, or the state attorney if he or she has possession of such currency, shall deposit the currency into an account:

(A) That is separate from other operating accounts;

(B) That bears interest, if such account is available; and

(C) At a financial institution that has a branch location within the county where the civil forfeiture proceeding is located, and if such financial institution is not available, at a financial institution approved by the chief superior court judge of the circuit in which such county is located.

(2) If the property is a negotiable instrument and is not needed for evidentiary purposes, within 60 days of the seizure the seizing agency, or the state attorney if he or she has possession of such item, shall secure the negotiable instrument in a financial institution that has a branch location within the county where the civil forfeiture proceeding is located, and if such financial institution is not available, at a financial institution approved by the chief superior court judge of the circuit in which such county is located. If such instrument is converted to currency, it shall be deposited in accordance with paragraph (1) of this subsection.

(3) The account holder shall annually pay any interest that accrues under this subsection into the County Drug Abuse Treatment and Education Fund established pursuant to Article 6 of Chapter 21 of Title 15 at the same time the account holder files its annual report in accordance with subsection (g) of Code Section 9-16-19. (Code 1981, § 9-16-10, enacted by Ga. L. 2015, p. 693, § 1-1/HB 233.)

**9-16-11. Administrative forfeiture for property valued at \$25,000.00 or less; notice; procedure.**

(a) If the estimated value of personal property seized is \$25,000.00 or less, the state attorney shall post a notice of the seizure of such property in a prominent location in the courthouse of the county in which the property was seized. Such notice shall include:

(1) A description of the property;

(2) The date and place of seizure;

(3) The conduct giving rise to forfeiture;

(4) The alleged violation of law; and

(5) A statement that the owner or interest holder of such property has 30 days within which a claim must be served on the state



attorney by certified mail or statutory overnight delivery, return receipt requested, and that such claim shall be signed by the owner or interest holder and shall provide:

- (A) The name of the claimant;
- (B) The address at which the claimant resides;
- (C) A description of the claimant's interest in the property;
- (D) A description of the circumstances of the claimant's obtaining an interest in the property and, to the best of the claimant's knowledge, the date the claimant obtained the interest and the name of the person or entity that transferred the interest to the claimant;
- (E) The nature of the relationship between the claimant and the person who possessed the property at the time of the seizure;
- (F) A copy of any documentation in the claimant's possession supporting his or her claim; and
- (G) Any additional facts supporting his or her claim.

(b) The state attorney shall serve a copy of the notice specified in subsection (a) of this Code section upon an owner, interest holder, and person in possession of the property at the time of seizure as follows:

(1) If the name and current address of the person in possession of the property at the time of the seizure, owner, or interest holder are known, provide notice by either personal service or mailing a copy of the notice by certified mail or statutory overnight delivery, return receipt requested, to that address;

(2) If the name and address of the person in possession of the property at the time of seizure, owner, or interest holder are required by law to be on public record with a governmental agency to perfect an interest in the property but the owner's or interest holder's current address is not known, mail a copy of the notice by certified mail or statutory overnight delivery, return receipt requested, to any address on the record; or

(3) If the current address of the person in possession of the property at the time of the seizure, owner, or interest holder is not known and is not on record as provided in paragraph (2) of this subsection or the name of the person in possession of the property at the time of the seizure, owner, or interest holder is not known, publish a copy of the notice of seizure once a week for two consecutive weeks in the legal organ for the county in which the seizure occurs.

(c)(1) The owner or interest holder may serve a claim to the seized property within 30 days after being served or within 30 days after the



second publication of the notice of seizure, whichever occurs last, by sending the claim to the state attorney by certified mail or statutory overnight delivery, return receipt requested.

(2) The claim shall be signed by the owner or interest holder and shall provide:

(A) The name of the claimant;

(B) The address at which the claimant resides;

(C) A description of the claimant's interest in the property;

(D) A description of the circumstances of the claimant's obtaining an interest in the property and, to the best of the claimant's knowledge, the date the claimant obtained the interest and the name of the person or entity that transferred the interest to the claimant;

(E) The nature of the relationship between the claimant and the person who possessed the property at the time of the seizure;

(F) A copy of any documentation in the claimant's possession supporting his or her claim; and

(G) Any additional facts supporting his or her claim.

(3) If any claim is served, even when the state attorney determines that the information provided by the claimant pursuant to paragraph (2) of this subsection is insufficient, the state attorney shall file a complaint for forfeiture as provided in Code Section 9-16-12 or 9-16-13 within 30 days of the actual receipt of the claim. Such complaint shall be filed specifically as to the property claimed and the state attorney shall join as a party any person who serves the state attorney with a claim.

(4) As to any property to which no claim is received within 30 days after service of the notice of seizure or the second publication of the notice of seizure, whichever occurs last, all right, title, and interest in the property shall be forfeited to the state by operation of law and the state attorney shall dispose of the property as provided in Code Section 9-16-19. The state attorney shall serve a copy of the order forfeiting the property by first-class mail upon any person who was served with a notice of seizure. (Code 1981, § 9-16-11, enacted by Ga. L. 2015, p. 693, § 1-1/HB 233.)

### **9-16-12. In rem forfeiture.**

(a) In actions in rem, the property which is the subject of the complaint for forfeiture shall be named as the defendant. The complaint shall be verified on oath or affirmation by a duly authorized agent of the



state in a manner consistent with Article 5 of Chapter 10 of this title. Such complaint shall describe the property with reasonable particularity; state that it is located within the county or will be located within the county during the pendency of the action; state its present custodian; state the name of the owner or interest holder, if known; allege the essential elements of the criminal violation which is claimed to exist; state the place of seizure, if the property was seized; and conclude with a prayer of due process to enforce the forfeiture.

(b)(1) A copy of the complaint and summons shall be served on any person known to be an owner or interest holder and any person who is in possession of the property.

(2) Issuance of the summons, form of the summons, and service of the complaint and summons shall be as provided in subsections (a), (b), (c), and (e) of Code Section 9-11-4.

(3) If real property is the subject of the complaint for forfeiture or the owner or interest holder is unknown or resides out of this state or departs this state or cannot after due diligence be found within this state or conceals himself or herself so as to avoid service, a copy of the notice of the complaint for forfeiture shall be published once a week for two consecutive weeks in the legal organ of the county in which the complaint for forfeiture is pending. Such publication shall be deemed notice to any and all persons having an interest in or right affected by such complaint for forfeiture and from any sale of the property resulting therefrom, but shall not constitute notice to an interest holder unless that person is unknown or resides out of this state or departs this state or cannot after due diligence be found within this state or conceals himself or herself to avoid service.

(4) If tangible property which has not been seized is the subject of the complaint for forfeiture, the court may order the sheriff or another law enforcement officer to take possession of the property. If the character or situation of the property is such that the taking of actual possession is impracticable, the sheriff shall execute process by affixing a copy of the complaint and summons to the property in a conspicuous place and by leaving another copy of the complaint and summons with the person having possession or his or her agent. In cases involving a vessel or aircraft, the sheriff or other law enforcement officer shall be authorized to make a written request with the appropriate governmental agency not to permit the departure of such vessel or aircraft until notified by the sheriff or the sheriff's deputy that the vessel or aircraft has been released.

(c)(1) An owner of or interest holder in the property may file an answer asserting a claim against the property in the action in rem. Any such answer shall be filed within 30 days after the service of the



summons and complaint. If service is made by publication and personal service has not been made, an owner or interest holder shall file an answer within 30 days of the date of final publication. An answer shall be verified by the owner or interest holder under penalty of perjury. In addition to complying with the general rules applicable to filing an answer in civil actions as set forth in Article 3 of Chapter 11 of this title, the answer shall set forth:

(A) The name of the claimant;

(B) The address at which the claimant resides;

(C) A description of the claimant's interest in the property;

(D) A description of the circumstances of the claimant's obtaining an interest in the property and, to the best of the claimant's knowledge, the date the claimant obtained the interest and the name of the person or entity that transferred the interest to the claimant;

(E) The nature of the relationship between the claimant and the person who possessed the property at the time of the seizure;

(F) A copy of any documentation in the claimant's possession supporting his or her answer; and

(G) Any additional facts supporting the claimant's answer.

(2) If the state attorney determines that an answer is deficient in some manner, he or she may file a motion for a more definite statement. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 15 days after notice of the order, or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just. If a motion for a more definite statement is filed, the time requirements for a trial set forth in subsection (f) of this Code section shall not commence until a sufficient answer has been filed.

(d) In addition to any injured person's right of intervention pursuant to Code Section 9-16-16, any owner or interest holder or person in possession of the property who suffers a pecuniary loss or physical injury due to a violation of Code Section 16-5-46, Article 4 or 5 of Chapter 8 of Title 16, or Chapter 14 of Title 16 may be permitted to intervene in any civil action brought pursuant to this Code section or Code Section 9-16-13 as provided by Chapter 11 of this title.

(e) If at the expiration of the period set forth in subsection (c) of this Code section no answer has been filed, the state attorney may seek a default judgment as provided in Code Section 9-11-55 and, if granted,



the court shall order the disposition of the seized property as provided for in Code Section 9-16-19.

(f) If an answer is filed, a bench trial shall be held within 60 days after the last claimant was served with the complaint; provided, however, that such trial may be continued by the court for good cause shown. Discovery as provided for in Article 5 of Chapter 11 of this title shall not be allowed; however, prior to trial, any party may apply to the court to allow for such discovery, and if discovery is allowed, the court may provide for the scope and duration of discovery and may continue the trial to a date not more than 60 days after the end of the discovery period unless continued by the court for good cause shown.

(g) An action in rem may be brought by the state attorney in addition to or in lieu of any other in rem or in personam action brought pursuant to this chapter. (Code 1981, § 9-16-12, enacted by Ga. L. 2015, p. 693, § 1-1/HB 233.)

### **9-16-13. In personam forfeiture.**

(a) In actions in personam, the complaint shall be verified on oath or affirmation by a duly authorized agent of the state in a manner consistent with Article 5 of Chapter 10 of this title. The complaint shall:

- (1) Describe with reasonable particularity the property which is sought to be forfeited;
- (2) State the property's present custodian;
- (3) State the name of the owner or interest holder, if known;
- (4) Allege the essential elements of the criminal violation which is claimed to exist;
- (5) State the place of seizure, if the property was seized; and
- (6) Conclude with a prayer of due process to enforce the forfeiture.

(b) Service of the complaint and summons shall be as follows:

(1) Except as otherwise provided in this Code section, issuance of the summons, form of the summons, and service of the complaint and summons shall be as provided by subsections (a), (b), (c), and (d) of Code Section 9-11-4; and

(2) If the defendant is unknown or resides out of this state or departs this state or cannot after due diligence be found within this state or conceals himself or herself so as to avoid service, notice of the complaint for forfeiture shall be published once a week for two consecutive weeks in the legal organ of the county in which the complaint for forfeiture is pending. Such publication shall be deemed sufficient notice to any such defendant.



(c) A defendant shall file a verified answer within 30 days after the service of the summons and complaint. If service is made by publication and personal service has not been made, a defendant shall file such answer within 30 days of the date of final publication. In addition to complying with the general rules applicable to filing an answer in civil actions as set forth in Article 3 of Chapter 11 of this title, the answer shall contain all of the elements set forth in subsection (c) of Code Section 9-16-12. If the state attorney determines that an answer is deficient in some manner, he or she may file a motion for a more definite statement. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 15 days after notice of the order, or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just. If a motion for a more definite statement is filed, the time requirements for a trial set forth in subsection (f) of this Code section shall not commence until a sufficient answer has been filed.

(d) In addition to any injured person's right of intervention pursuant to Code Section 9-16-16, any owner or interest holder or person in possession of the property who suffers a pecuniary loss or physical injury due to a violation of Code Section 16-5-46, Article 4 or 5 of Chapter 8 of Title 16, or Chapter 14 of Title 16 may be permitted to intervene in any civil action brought pursuant to this Code section or Code Section 9-16-12 as provided by Chapter 11 of this title.

(e) If at the expiration of the period set forth in subsection (c) of this Code section no answer has been filed, the state attorney may seek a default judgment as provided in Code Section 9-11-55 and, if granted, the court shall order the disposition of the seized property as provided for in Code Section 9-16-19.

(f) If an answer is filed, a bench trial shall be held within 60 days after the last claimant was served with the complaint; provided, however, that such trial may be continued by the court for good cause shown. Discovery as provided for in Article 5 of Chapter 11 of this title shall not be allowed; however, prior to trial any party may apply to the court to allow for such discovery, and if discovery is allowed, the court may provide for the scope and duration of discovery and may continue the trial to a date not more than 60 days after the end of the discovery period unless continued by the court for good cause shown.

(g) On a determination of liability of a person for conduct giving rise to forfeiture, the court shall enter a judgment of forfeiture of the property described in the complaint and shall also authorize the state attorney or his or her agent or any law enforcement officer or peace officer to seize all property ordered to be forfeited which was not previously seized or was not then under seizure. Following the entry of



an order declaring the property forfeited, the court, on application of the state attorney, may enter any appropriate order to protect the interest of the state in the property ordered to be forfeited. (Code 1981, § 9-16-13, enacted by Ga. L. 2015, p. 693, § 1-1/HB 233.)

**9-16-14. Restraining order, injunction, and other measures to seize, maintain, or preserve property; hearing.**

In conjunction with any civil forfeiture proceeding or criminal proceeding involving forfeiture:

(1) The court, upon application of the state attorney, may enter any restraining order or injunction; require the execution of satisfactory performance bonds; appoint receivers, conservators, appraisers, accountants, or trustees; or take any action to seize, secure, maintain, or preserve the availability of property subject to forfeiture, including issuing a warrant for its seizure and writ of attachment, whether before or after the filing of a complaint for forfeiture;

(2) A temporary restraining order under this Code section may be entered on application of the state attorney, without notice or an opportunity for a hearing, if the state attorney demonstrates that:

(A) There is probable cause to believe that the property subject to the order, in the event of final judgment or conviction, would be subject to forfeiture; and

(B) Provision of notice would jeopardize the availability of the property for forfeiture;

(3) Notice of the entry of a restraining order and an opportunity for a hearing shall be afforded to persons known to have an interest in the property. The hearing shall be held at the earliest possible date consistent with subsection (b) of Code Section 9-11-65 and shall be limited to the issues of whether:

(A) There is a probability that the state will prevail on the issue of forfeiture and that failure to enter the order will result in the property's being destroyed, conveyed, encumbered, removed from the jurisdiction of the court, concealed, or otherwise made unavailable for forfeiture; and

(B) The need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any owner or interest holder against whom the order is to be entered;

(4) If property is seized for forfeiture or a forfeiture lien is filed without a previous judicial determination of probable cause or order of forfeiture or a hearing under paragraph (2) of this Code section, the court, on an application filed by an owner of or interest holder in the



property within 30 days after notice of its seizure or forfeiture lien or actual knowledge of such seizure or lien, whichever is earlier, and complying with the requirements for an answer to an in rem complaint, and after five days' notice to the district attorney of the judicial circuit where the property was seized or, in the case of a forfeiture lien, to the state attorney filing such lien, may issue an order to show cause to the state attorney and seizing law enforcement agency for a hearing on the sole issue of whether probable cause for forfeiture of the property then exists. The hearing shall be held within 30 days unless continued for good cause on motion of either party. If the court finds that there is no probable cause for forfeiture of the property, the property shall be released. In determining probable cause, the court shall apply the rules of evidence; provided, however, that hearsay shall be admissible; and

(5) The court may order property that has been seized for forfeiture to be sold to satisfy a specified interest of any interest holder, on motion of any party, and after notice and a hearing, on the conditions that:

(A) The interest holder has filed a proper claim and has an interest that the state attorney has stipulated is exempt from forfeiture, provided that if the interest holder is a financial institution, it is also authorized to do business in this state and is under the jurisdiction of a governmental agency which regulates financial institutions, securities, insurance, or real estate;

(B) The interest holder shall dispose of the property by commercially reasonable public sale and apply the income first to its interest and then to its reasonable expenses incurred in connection with the sale or disposal; and

(C) The balance of the income, if any, shall be returned to the actual or constructive custody of the court, in an interest bearing account, subject to further proceedings under this chapter. (Code 1981, § 9-16-14, enacted by Ga. L. 2015, p. 693, § 1-1/HB 233.)

#### **9-16-15. Stay of civil forfeiture proceedings during pendency of criminal proceedings; effect of criminal conviction.**

(a) For good cause shown by the state or the owner or interest holder of the property, the court may stay civil forfeiture proceedings during the pendency of criminal proceedings resulting from a related indictment or accusation until such time as the criminal proceedings result in a plea of guilty, a conviction after trial, or an acquittal after trial or are otherwise concluded before the trial court.

(b) An acquittal or dismissal in a criminal proceeding shall not preclude civil forfeiture proceedings.



(c) A defendant convicted in any criminal proceeding shall be precluded from later denying the essential allegations of the criminal offense of which the defendant was convicted in any civil forfeiture proceeding against such defendant pursuant to this chapter, regardless of the pendency of an appeal from that conviction; provided, however, that the evidence of the pendency of an appeal shall be admissible. For the purposes of this subsection, the term 'conviction' means the result from a verdict or plea of guilty, including a plea of nolo contendere. (Code 1981, § 9-16-15, enacted by Ga. L. 2015, p. 693, § 1-1/HB 233.)

#### **9-16-16. Recovery by an injured person.**

(a) As used in this Code section, the term 'injured person' means any person who suffers a pecuniary loss or physical injury due to a violation of Code Section 16-5-46, Article 4 or 5 of Chapter 8 of Title 16, or Chapter 14 of Title 16. In the event that such person is a child or deceased, the provisions of subparagraphs (B) and (C) of paragraph (11) of Code Section 17-17-3 shall apply.

(b) If an injured person has provided contact information pursuant to Chapter 17 of Title 17, a state attorney shall serve every known injured person, if he or she has not previously been served, with a copy of the complaint for forfeiture and a notice of such person's right of intervention at least 30 days prior to the entry of a final judgment.

(c) Notwithstanding the distribution of forfeiture proceeds as set forth in Code Section 9-16-19, any injured person shall have a right or claim to forfeited property or to the proceeds superior to any right or claim the state or local government has in the same property or proceeds other than for costs. To enforce such a claim, the injured person must intervene in the civil forfeiture proceeding prior to the entry of a final judgment. (Code 1981, § 9-16-16, enacted by Ga. L. 2015, p. 693, § 1-1/HB 233.)

#### **9-16-17. Burden of proof and presumptions.**

(a)(1) The state's burden of proof shall be to show by a preponderance of the evidence that seized property is subject to forfeiture.

(2) A property interest shall not be subject to forfeiture under this chapter if the owner of the interest or interest holder establishes that the owner or interest holder:

- (A) Is not privy to criminal conduct giving rise to its forfeiture;
- (B) Did not consent to the conduct giving rise to the forfeiture;
- (C) Did not know of the conduct giving rise to the forfeiture;



(D) Did not know the conduct giving rise to the forfeiture was likely to occur;

(E) Should not have reasonably known the conduct giving rise to the forfeiture was likely to occur;

(F) Had not acquired and did not stand to acquire substantial proceeds from the conduct giving rise to its forfeiture other than as an interest holder in an arm's length commercial transaction;

(G) With respect to conveyances for transportation only, did not hold the property jointly, in common, or in community with a person whose conduct gave rise to the forfeiture;

(H) Does not hold the property for the benefit of or as nominee for any person whose conduct gave rise to its forfeiture, and, if the owner or interest holder acquired the interest through any such person, the owner or interest holder acquired it as a bona fide purchaser for value without knowingly taking part in an illegal transaction; and

(I) Acquired the interest:

(i) Before the completion of the conduct giving rise to its forfeiture and the person whose conduct gave rise to its forfeiture did not have the authority to convey the interest to a bona fide purchaser for value at the time of the conduct; or

(ii) After the completion of the conduct giving rise to its forfeiture:

(I) As a bona fide purchaser for value without knowingly taking part in an illegal transaction;

(II) Before the filing of a forfeiture lien on it and before the effective date of a notice of pending forfeiture relating to it and without notice of its seizure for forfeiture; and

(III) At the time the interest was acquired, was reasonably without cause to believe that the property was subject to forfeiture or likely to become subject to forfeiture.

(b) There shall be a rebuttable presumption that any property of a person is subject to forfeiture under this chapter if the state attorney establishes by a preponderance of the evidence that:

(1) The person has engaged in conduct giving rise to forfeiture;

(2) The property was acquired by the person during the period of the conduct giving rise to forfeiture or within a reasonable time after such period; and



(3) There was no likely source for the property other than the conduct giving rise to forfeiture. (Code 1981, § 9-16-17, enacted by Ga. L. 2015, p. 693, § 1-1/HB 233.)

**9-16-18. Forfeited property vests in state at time conduct giving rise to forfeiture committed; release of property upon entry of judgment in favor of owner.**

(a) All property declared to be forfeited vests in the state at the time of commission of the conduct giving rise to forfeiture together with the proceeds of the property after that time. Any property or proceeds transferred later to any person remain subject to forfeiture and thereafter shall be ordered to be forfeited unless the transferee claims and establishes in a hearing under this chapter that the transferee is a bona fide purchaser for value and the transferee's interest is exempt under paragraph (2) of subsection (a) of Code Section 9-16-17.

(b) On entry of judgment for a person claiming an interest in the property that is subject to a civil forfeiture proceeding, the court shall order that the property or interest in the property be released or delivered promptly to that person free of liens and encumbrances. (Code 1981, § 9-16-18, enacted by Ga. L. 2015, p. 693, § 1-1/HB 233.)

**9-16-19. Disposition of forfeited property; order of distribution; annual report.**

(a) As used in this Code section, the term:

(1) "Entity" means and includes, but shall not be limited to, a law enforcement agency, multijurisdictional task force, or office, agency, authority, department, commission, board, body, division, instrumentality, or institution of the state or any political subdivision.

(2) "Law enforcement agency" means a governmental unit of one or more persons employed full time or part time by the state, a state agency or department, or a political subdivision for the purposes of preventing and detecting crime and enforcing state laws or local ordinances, employees of which unit are authorized to make arrests for crimes or seize property while acting within the scope of their authority.

(3) "Multijurisdictional task force" means a cooperative law enforcement effort involving personnel from two or more law enforcement agencies who are employed by or acting under the authority of different governmental authorities.

(4) "Official law enforcement purpose" means expenditures associated with investigations; training; travel; the purchase, lease, main-



tenance, and improvement of equipment, law enforcement facilities, and detention facilities; capital improvements; victim assistance and witness assistance services; the costs of accounting, auditing, and tracking of expenditures for federally shared cash, proceeds, and tangible property; awards, museums, and memorials directly related to law enforcement; drug and gang education and awareness programs; the payment of matching funds for state or federal grant programs that enhance law enforcement services to the community or judicial circuit; and reimbursement to a governing authority for a pro rata share of the indirect costs incurred by the governing authority for a common or joint purpose benefiting the law enforcement agency and other local government agencies which are not readily assignable to any particular agency.

(5) “Official prosecutorial purpose” means expenditures associated with investigations; hearings; trials; appeals; forensic services; language interpreters or interpreters for the hearing impaired; travel expenses that conform to the provisions set forth in Code Sections 15-18-12 and 50-5B-5; training related to the official functions of the district attorney; the purchase, lease, maintenance, and improvement of equipment; victim assistance and witness assistance services; the payment of matching funds for state or federal grant programs that enhance prosecution, victim, or witness services to the community or judicial circuit; reimbursement to a governing authority for a pro rata share of the indirect costs incurred by the governing authority for a common or joint purpose benefiting the district attorney’s office and other local government agencies which are not readily assignable to any particular agency; and the payment of salaries and benefits in conformity with subsection (e) of Code Section 15-18-19 and Code Section 15-18-20.1.

(6) “Prosecuting Attorneys’ Council” means the Prosecuting Attorneys’ Council of the State of Georgia.

(b) Whenever property is forfeited under this chapter, any property which is required by order of the court or by law to be destroyed or which is harmful to the public shall, when no longer needed for evidentiary purposes, be destroyed or forwarded to the Division of Forensic Sciences of the Georgia Bureau of Investigation or any other agency of state or local government for destruction or for any medical or scientific use not prohibited under the laws of this state or of the United States.

(c) When property, other than currency or real property, is forfeited under this chapter, the court may:

(1) Order the property to be sold, with the income from the sale to be distributed as provided in subsection (f) of this Code section; or



(2) Provide for the in-kind distribution of the property as provided for in subsection (f) of this Code section.

(d) When real property is forfeited, the court may appoint a person to act as the receiver of such property for the limited purpose of holding and transferring title and may order that:

(1) The title to the real property be placed in the name of the state;

(2) The title to the real property be placed in the name of the political subdivision which will be taking charge of such property. Such political subdivision shall then:

(A) Sell the property with such conditions as the court deems proper and distribute the income as provided in subsection (f) of this Code section; or

(B) Hold the property for use by one or more law enforcement agencies;

(3) The real property be turned over to an appropriate political subdivision without restrictions;

(4) The real property be deeded to a land bank authority as provided in Article 4 of Chapter 4 of Title 48; or

(5) The real property be disposed of in any commercially reasonable manner as the court deems proper.

(e) When property is to be sold pursuant to this Code section:

(1) The court may direct that such property be sold by:

(A) Judicial sale as provided in Article 7 of Chapter 13 of this title; provided, however, that the court may establish a minimum acceptable price for such property; or

(B) Any commercially feasible means, including, but not limited to, in the case of real property, listing such property with a licensed real estate broker, selected by a state attorney through competitive bids; and

(2) The income from such sale shall be paid into the registry of the court or deposited into an account as specified in paragraph (1) of subsection (c) of Code Section 9-16-10 as directed by the court.

(f)(1) The state attorney shall submit a proposed order of distribution to the court and the court shall issue an order of distribution. Such order shall specify the time frame for the transfer of forfeited property and the entity responsible for effectuating the transfer of such property. The state attorney shall provide a copy of the order of distribution to any entity responsible for effectuating such transfer. The state attorney shall provide a copy of the order of distribution to



the chief executive officer of each political subdivision whose law enforcement agency will receive a distribution pursuant to such order.

(2) All property forfeited in the same civil forfeiture proceeding shall be pooled together and a fair market value shall be assigned to each item of property other than currency in such pool. A total value shall be established for the pool by adding together the fair market value of all such property in the pool, the amount of currency in the pool, and any accrued interest.

(3)(A) The first distribution from the pool shall be to pay costs and court costs to the entity incurring the costs or court costs.

(B) Except as provided in subparagraph (E) of this paragraph, the second distribution from the pool, upon the request of the district attorney, shall be 10 percent of such pool which shall be paid to the district attorney's office, in recognition of the district attorney's effort in completing the civil forfeiture proceeding, and shall be used by a district attorney for official prosecutorial purposes. Forfeited property and the sums held by a district attorney shall be in addition to the respective budgets of the state and the counties comprising the judicial circuit for a district attorney and shall not supplant such appropriations.

(C) Except as provided in subparagraph (E) of this paragraph, the third distribution from the pool shall be pro rata to law enforcement agencies and multijurisdictional task forces according to the role each law enforcement agency or multijurisdictional task force played in the seizure and forfeiture of the forfeited property up to the limits set forth in division (4)(A)(ii) of this subsection.

(D) If there remains currency in the pool after the distributions set forth in subparagraphs (A) through (C) of this paragraph, it may be distributed as further set forth in division (4)(A)(iii) or (4)(B)(ii) of this subsection, as applicable.

(E) If the civil forfeiture proceeding results from criminal conduct in violation of Article 11 of Chapter 1 of Title 7, Code Section 16-5-46, Article 5 of Chapter 8 of Title 16, or Chapter 14 of Title 16, after satisfaction of the interest of any innocent party, the court may make any division of the pool among the state, political subdivisions, or agencies or departments of the state or political subdivisions commensurate with the assistance each contributed to the underlying criminal prosecution or civil forfeiture proceeding, or both such actions.

(4) Property distribution shall be as follows:

(A) With respect to political subdivisions:



(i) Property distributed in kind to a political subdivision or multijurisdictional task force for use by an agency, department, or officer of a political subdivision for official law enforcement purposes shall be designated in the order of distribution and shall be titled accordingly; provided, however, that property may be distributed for other purposes to any other entity so long as such designation is made in the order of distribution and reported in accordance with subsection (g) of this Code section. If real property is distributed to a political subdivision, the political subdivision may transfer the real property to a land bank authority as provided in Article 4 of Chapter 4 of Title 48. When in-kind property is no longer needed by the recipient, it shall be disposed of in accordance with the political subdivision's policy and procedure;

(ii) Currency distributed to local law enforcement agencies or to multijurisdictional task forces shall be paid or credited to such agencies or task forces as provided in the order of distribution; provided, however, that such agency or task force shall not be eligible to receive more than 33  $\frac{1}{3}$  percent of the amount of local funds appropriated or otherwise made available to such agency or task force for the fiscal year in which such funds are distributed. Such currency may be used for any official law enforcement purpose at the discretion of the chief officer of the law enforcement agency receiving such distribution, provided that such distribution shall not be used to supplant any other local, state, or federal funds appropriated for staff or operations or to pay salaries or rewards to law enforcement personnel;

(iii) Currency not distributed pursuant to division (ii) of this subparagraph shall be expended for any official law enforcement purpose; for the representation of indigents in criminal cases; for drug treatment, mental health treatment, rehabilitation, prevention, or education or any other program which deters drug or substance abuse or responds to problems created by drug or substance abuse; for use as matching funds for grant programs related to drug treatment or prevention; to fund victim assistance; or for any combination of the foregoing; and

(iv) When a chief officer of a law enforcement agency does not qualify as a candidate for reelection or has been defeated in any election, he or she shall not transfer any currency or property received due to civil forfeiture proceedings to any other entity prior to leaving office; provided, however, that he or she may continue to expend such currency or make use of such property for any official law enforcement purpose within his or her law enforcement agency; and



(B) With respect to the state:

(i) Property distributed in kind to the state for use by a state agency, officer of the state, or district attorney shall be designated in the order of distribution; provided, however, that property may be distributed for other purposes to any other entity so long as such designation is made in the order of distribution and reported in accordance with subsection (g) of this Code section. When a state agency, officer of the state, or district attorney determines that in-kind property is no longer needed by the recipient, it shall be delivered over to the Department of Administrative Services for such use or disposition as may be determined by the commissioner of administrative services;

(ii) Currency distributed to the state for use by a state agency, officer of the state, district attorney, or as further set forth in this division shall be paid as provided in the order of distribution. It is the intent of the General Assembly that the currency otherwise distributed to the state be used, subject to appropriation from the general fund in the manner provided by law, for funding of Article 2 of Chapter 12 of Title 17, the "Georgia Indigent Defense Act of 2003," for representation of indigents in criminal cases; for funding of the Georgia Crime Victims Emergency Fund; for law enforcement and prosecution agency programs and particularly for funding of advanced drug investigation and prosecution training for law enforcement officers and prosecuting attorneys; for drug treatment, mental health treatment, rehabilitation, prevention, or education or any other program which deters drug or substance abuse or responds to problems created by drug or substance abuse; for use as matching funds for grant programs related to drug treatment or prevention; or for financing the judicial system of the state; and

(iii) When a district attorney does not qualify as a candidate for reelection or has been defeated in any election, he or she shall not transfer any currency or property received due to civil forfeiture proceedings to any other entity prior to leaving office; provided, however, that he or she may continue to expend such currency or make use of such property for any official prosecutorial purpose within his or her office.

(g)(1) Property and proceeds forfeited pursuant to this chapter and any income resulting from the sale of forfeited property is government property. It is the intent of the General Assembly that there be accountability and transparency applicable to the distribution of forfeited property and income from the sale of forfeited property. The appropriate accounting and auditing standards shall be applicable to such distribution.



(2) Any law enforcement agency, multijurisdictional task force, district attorney, or state agency receiving property and proceeds forfeited pursuant to this chapter and any income resulting from the sale of forfeited property, including property distributed in kind, shall submit an annual report specifying the property and proceeds forfeited pursuant to this chapter and any income resulting from the sale of forfeited property received during its reporting year and shall clearly identify the use of such property, proceeds, and income, including the specifics of all monetary expenditures and funds on deposit with a financial institution. Such report shall not include any information that is likely to disclose the identity of a confidential source, disclose confidential investigative or prosecution material which could endanger the life or physical safety of any person, disclose the existence of a confidential surveillance or investigation, or disclose techniques and procedures for law enforcement investigations or prosecutions. Such annual report shall be appropriately completed and legible. Such report shall be:

(A) With respect to law enforcement agencies, multijurisdictional task forces, and state agencies:

(i) Submitted on a form promulgated by the Prosecuting Attorneys' Council, as provided in subparagraph (A) of paragraph (3) of this subsection;

(ii) Submitted by each local law enforcement agency to the political subdivision governing its jurisdiction;

(iii) Submitted by multijurisdictional task forces to each political subdivision governing the jurisdictions involved;

(iv) Submitted by state agencies to the state auditor;

(v) Submitted by January 31 each year for the previous calendar year; and

(vi) Copied and submitted to the Carl Vinson Institute of Government of the University of Georgia as provided in Code Section 36-80-21; and

(B) With respect to district attorneys:

(i) Submitted on a form promulgated by the Prosecuting Attorneys' Council, as provided in subparagraph (B) of paragraph (3) of this subsection;

(ii) Submitted by district attorneys to the Prosecuting Attorneys' Council according to the rules and regulations adopted by the Prosecuting Attorneys' Council;

(iii) Submitted to the state auditor;



(iv) Submitted by January 31 each year for the previous calendar year; and

(v) Copied and submitted to the Carl Vinson Institute of Government of the University of Georgia as provided in Code Section 36-80-21.

(3)(A) The Prosecuting Attorneys' Council shall promulgate and from time to time amend as necessary and post on its website an annual reporting form for use by law enforcement agencies, multijurisdictional task forces, and state agencies to report the information required by this subsection. In creating this form, the Prosecuting Attorneys' Council shall consider input from the Georgia Peace Officer Standards and Training Council, the Georgia Sheriffs' Association, and the Georgia Association of Chiefs of Police. Such form shall include, but shall not be limited to, the following information:

(i) As to property, other than currency, an itemization specifying:

(I) The date the property was received by the entity;

(II) The make, model, and serial number, when relevant; provided, however, that such details shall not be required when such details would disclose the identification of property being used in a confidential investigation or would compromise an ongoing investigation;

(III) The statutes upon which the property was subject to forfeiture;

(IV) The estimated value of the property received;

(V) If the property was sold, the date of the sale and the gross and net income received;

(VI) If the property was retained, the purpose for which it was used; provided, however, that such details shall not be required when such details would disclose the identification of property being used in a confidential investigation or would compromise an ongoing investigation; and

(VII) If the property was destroyed, the date of the destruction;

(ii) As to currency, an itemization specifying:

(I) The amount of currency forfeited and the date the currency was received; and

(II) The statutes upon which the currency was subject to forfeiture;



(iii) If property was returned to an owner or interest holder, by the seizing law enforcement agency or in the order of distribution, a description of such property and date of return of such property;

(iv) The total for the reporting year of the amount of currency forfeited and net income from the sale of forfeited property which the entity received;

(v) A description of the use and expenditure of forfeited funds for the reporting year, specifying for each expenditure the amount expended and the purpose for which each expenditure was made; and

(vi) The total amount of forfeited currency held in a financial institution at the end of the reporting year, including the net income from the sale of forfeited property and interest earned.

(B) The Prosecuting Attorneys' Council shall promulgate and from time to time amend as necessary and post on its website an annual reporting form for district attorneys to use to report the information required by this subsection. In creating this form, the Prosecuting Attorneys' Council shall consider input from the District Attorneys' Association of Georgia. Such form shall include, but shall not be limited to, the following information:

(i) As to in-kind property received, an itemization specifying:

(I) The date the property was received;

(II) The make, model, and serial number, when relevant; provided, however, that such details shall not be required when such details would disclose the identification of property being used in a confidential investigation or would compromise an ongoing investigation;

(III) The statutes upon which the property was subject to forfeiture; and

(IV) A description of the purpose to which the property was put;

(ii) As to currency received, an itemization specifying:

(I) The amount of currency and the date the currency was received; and

(II) A description of the use and expenditure of forfeited currency for the reporting year, specifying for each expenditure the amount expended and the purpose for which each expenditure was made; and



(iii) The total amount of currency received by the district attorney during the reporting year and the amount remaining that has not been expended, including any interest earned.

(4) The annual report required by this subsection may be submitted electronically, provided the submission complies with Chapter 12 of Title 10.

(5)(A) The district attorney having jurisdiction where the local law enforcement agency or multijurisdictional task force is located shall be authorized to conduct an investigation and bring any criminal prosecution or civil action he or she deems necessary to ensure compliance with this subsection. The district attorney shall provide an entity required to comply with the reporting requirements of this subsection and found to have committed a violation of this subsection 60 days to demonstrate to the district attorney that such entity has come into compliance with this subsection. If, after 60 days, the entity has failed to correct all deficiencies, such entity shall be prohibited from being eligible to receive property derived or resulting from civil forfeiture proceedings until such time as the entity demonstrates to the district attorney that such entity has corrected all deficiencies and is in compliance with this subsection; provided, however, that if the chief officer of the entity has resigned or has been removed from office, the prohibition shall not apply so long as his or her successor in office corrects all deficiencies within 180 days of taking office. At any time after the district attorney finds an entity to be in violation of this subsection, such entity may seek administrative relief through the Office of State Administrative Hearings. If an entity seeks administrative relief, the time for correcting deficiencies shall be tolled, and any action to exclude the entity from receiving property derived or resulting from civil forfeiture proceedings shall be suspended until such time as a final ruling upholding the findings of the district attorney is issued.

(B) If the district attorney is disqualified from conducting any investigation under this paragraph, the district attorney shall notify the Attorney General in accordance with Code Section 15-18-5.

(6) If an audit concludes that a district attorney has used property in violation of this Code section and the auditor notifies the district attorney of such violation, he or she shall take appropriate action to remedy the audit's findings and repay or redistribute property improperly used. If the district attorney fails to remedy the audit's findings within 60 days of such notification, the auditor shall notify the Attorney General for further legal action.

(7) Any person who knowingly and willfully makes a false, fictitious, or fraudulent annual report pursuant to this subsection shall



be guilty of a violation of Code Section 16-10-20 and, upon conviction, shall be punished as provided in such Code section. Any entity that employed a person convicted of false statements based on a violation of this subsection shall be prohibited from being eligible to receive property derived or resulting from civil forfeiture proceedings for a period of two years commencing from the date of such conviction, unless such entity no longer employs such person. (Code 1981, § 9-16-19, enacted by Ga. L. 2015, p. 693, § 1-1/HB 233.)

**9-16-20. Court may order forfeiture of other property under certain circumstances; civil action; enforcement of judgments; persons having interest in property barred from collaterally attacking forfeiture proceedings; limitations.**

(a) The court shall order the forfeiture of any property of a claimant or defendant up to the value of property found by the court to be subject to forfeiture if any of the forfeited property:

- (1) Cannot be located;
- (2) Has been transferred or conveyed to, sold to, or deposited with a third party;
- (3) Is beyond the jurisdiction of the court;
- (4) Has been substantially diminished in value while not in the actual physical custody of the receiver or governmental agency directed to maintain custody of the property; or
- (5) Has been commingled with other property that cannot be divided without difficulty.

(b) In addition to any other remedy provided for by law, a state attorney on behalf of the state may institute a civil action in any court of the United States against any person acting with knowledge or any person to whom notice of a forfeiture lien has been provided in accordance with Code Section 9-16-8; to whom notice of seizure has been provided in accordance with Code Section 9-16-11; or to whom notice of a civil forfeiture proceeding has been provided, if property subject to forfeiture is conveyed, alienated, disposed of, or otherwise rendered unavailable for forfeiture after the filing of a forfeiture lien, filing of a complaint for forfeiture pursuant to Code Section 9-16-12 or 9-16-13, or the service of a notice of seizure pursuant to Code Section 9-16-11, as the case may be. The state may recover judgment in an amount equal to the value of the forfeiture lien but not to exceed the fair market value of the property or, if there is no forfeiture lien, in an amount not to exceed the fair market value of the property, together with reasonable investigative expenses and attorney's fees.



(c) A state attorney may file and prosecute in any of the courts of the United States or as may be necessary to enforce any judgment rendered pursuant to this chapter.

(d) No person claiming an interest in property subject to forfeiture may commence or maintain any civil action concerning the validity of the alleged interest other than as provided in this chapter. No person claiming an interest in property subject to forfeiture may file any counterclaim or cross-claim to any action brought pursuant to this chapter. Except as specifically authorized by subsection (d) of Code Section 9-16-12, subsection (d) of Code Section 9-16-13, or Code Section 9-16-16, providing for intervention, no person claiming an interest in such property may intervene in any civil forfeiture proceeding.

(e) A civil forfeiture proceeding shall be commenced within four years after the last conduct giving rise to forfeiture or to the claim for relief became known or should have become known, excluding any time during which either the property or defendant is out of the state or in confinement or during which criminal proceedings relating to the same conduct are in progress. (Code 1981, § 9-16-20, enacted by Ga. L. 2015, p. 693, § 1-1/HB 233.)

#### **9-16-21. Effect of federal law forfeitures; annual report.**

(a) Property seized or forfeited pursuant to federal law, and such property or proceeds, authorized by such federal law to be transferred to a cooperating law enforcement agency of this state or any political subdivision thereof shall be utilized by the law enforcement agency or political subdivision to which the property or proceeds are so transferred as authorized by such federal law and regulations or guidelines promulgated thereunder. If federal law and regulations or guidelines promulgated thereunder are silent as to the utilization of such property or proceeds, the property and proceeds shall be disposed of and utilized as set forth in Code Section 9-16-19.

(b) Any law enforcement agency receiving property or proceeds pursuant to federal law shall also comply with subsection (g) of Code Section 9-16-19. (Code 1981, § 9-16-21, enacted by Ga. L. 2015, p. 693, § 1-1/HB 233.)

#### **9-16-22. Construction.**

This chapter shall be liberally construed to effectuate its remedial purposes. (Code 1981, § 9-16-22, enacted by Ga. L. 2015, p. 693, § 1-1/HB 233.)







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